IRAQ CLAIMS ACT OF 1993

HEARINGS

AND

MARKUP

BEFORE THE

COMMITTEE ON FOREIGN AFFAIRS

AND ITS

SUBCOMMITTEE ON EUROPE AND THE MIDDLE EAST

OF THE

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 3221

OCTOBER 13, 14, 20, and 28, 1993

Printed for the use of the Committee on Foreign Affairs

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H.R. 3221—IRAQ CLAIMS ACT OF 1993

IRAQ CLAIMS ACT OF 1993

WEDNESDAY, OCTOBER 13, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, pursuant to call, at 9:10 a.m., in room 2172, Rayburn House Office Building, Hon. Lee H. Hamilton (chairman) presiding.

OPENING STATEMENT OF HON. LEE H. HAMILTON

Chairman HAMILTON. Come to order. We welcome as our witnesses today, Mike Matheson, the Principal Deputy Legal Adviser of the Department of State; Mr. Richard Newcomb, Director of Foreign Assets Control, Department of the Treasury. We have called these witnesses to explain the administration's request for legislation to adjudicate the claims of U.S. nationals against Iraq.

Now, I have introduced this legislation in a slightly redrafted form as H.R. 3221, the Iraq Claims Act of 1993. It is scheduled for markup by this committee tomorrow at 10 a.m. All of us have a few questions about the legislation, but we would like to hear your brief statements from both witnesses before we begin. It doesn't make any difference to the Chair who begins first.

Mr. Matheson, please go ahead. Thank you for joining us.

STATEMENT OF MICHAEL J. MATHESON, PRINCIPAL DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. MATHESON. Thank you, very much, Mr. Chairman and members of the committee. We very much appreciate the opportunity to appear before the committee today in support of the proposed Iraq Claims Act of 1993.

The administration strongly supports this legislation. We believe that it would provide a fair and orderly system for resolving the claims of U.S. nationals and the U.S. Government against Iraq. It would help to implement the system set up by the United Nations that will compensate the victims of Iraq's invasion and occupation of Kuwait from the proceeds of future Iraqi oil sales. In addition, it would authorize us to provide compensation for claims that are not within the jurisdiction of the U.N. Compensation Commission from Iraqi assets frozen in the United States.

For example, the claims of members of military forces who served in the Persian Gulf are not covered by the U.N. program. In addition, the U.N. program does not cover prewar claims against Iraq. In the case of the United States, this would include unsatisfied prewar claims of many U.S. individuals and businesses, such as de-

fault of loans to Iraq and the claims of U.S. Navy personnel who were injured in the Iraqi attack on the U.S.S. *Stark*. It would also include substantial prewar claims by the U.S. Government against Iraq. These are mostly unpaid CCC loan guarantees.

The proposed legislation would provide a procedure for adjudicating these claims of U.S. nationals in an orderly manner in a single forum, affording all claimants an equitable opportunity for recovery. The claims of U.S. nationals would be adjudicated by the U.S. Foreign Claims Settlement Commission, which is an entity of the Department of Justice. The bill would authorize the vesting and liquidation of frozen Iraqi assets in the United States and establish an Iraq Claims Fund in the Treasury to pay claims of U.S. nationals that are outside the jurisdiction of the U.N. Compensation Commission. The bill would also authorize the President to allocate a portion of these funds for the payment of the Government's claims.

In addition, the bill would authorize the Foreign Claims Settlement Commission to allocate among U.S. claimants any lump-sum awards that may be received from the U.N. Compensation Commission for Gulf War claims. To the extent the U.N. Commission decides claims on an individual basis, the awards would be distributed to U.S. recipients without the need for further action by the Foreign Claims Settlement Commission.

Mr. Chairman, this legislation will not guarantee full compensation to U.S. claimants. Prewar claims are expected greatly to exceed the value of frozen Iraqi assets in the United States, and worldwide invasion claims before the U.N. Commission are expected to exceed $100 billion—that's billion with a "b"—which is likely to be more than the funds available from the U.N. portion of future Iraqi oil sales. Nevertheless, we believe that this bill would provide a mechanism for U.S. claimants to adjudicate their claims and to obtain substantial compensation.

If this bill were not passed, claimants might feel compelled to seek to recover their losses in a piecemeal fashion in U.S. courts by obtaining judgements which they would then seek to collect from the limited amount of frozen Iraqi assets in the United States. Even if such actions were permitted, it would be a costly and chaotic process.

The situation is similar to that of a bankruptcy in which there are inadequate assets to satisfy all of the legitimate claims. In similar domestic situations, Congress has provided a single mechanism to adjudicate all claims against the bankrupt entity in an orderly fashion and to make an equitable distribution of the assets. The U.N. has adopted a similar approach with respect to war-related claims against Iraq, and this legislation before you today would provide a similar forum where all U.S. nationals' claims not covered by the U.N. Commission can be adjudicated under uniform criteria and compensated equitably.

In our view, it is important to act on this legislation soon, since delay would serve to postpone recovery by U.S. claimants, foster confusion in the claimant community, and encourage a race to the courthouse with potential dissipation of the pool of blocked assets. It would be more efficient, more equitable to adjudicate these claims now before the Foreign Claims Settlement Commission while witnesses are still available, while the evidence is still fresh.

Delay would only hamper the adjudication of such claims in the future.

Now, we understand that there may be some concern that the legislation could have an adverse impact on pending litigation. However, this litigation only exists because the U.S. Government has not yet provided a forum to handle the claims of U.S. nationals that are outside the scope of the U.N. claims program. The proposed legislation would fairly deal with those who have already brought their claims into the courts, giving them an equal opportunity to resolve their claims before the Foreign Claims Settlement Commission. It would be unwarranted, however, to give special preference to those who have instituted such litigation, which would be the effect of some proposals that have surfaced in the Senate.

The proposed legislation would instead provide a fair and orderly claims program for all claimants. The only priority that would be created by the bill is for noncommercial claims of members of U.S. Armed Forces who served in Desert Shield and Desert Storm, and of other individuals arising out of Iraq's invasion and occupation of Kuwait. These claims would be accorded priority to alleviate individual hardships as quickly as possible.

Mr. Chairman, we very much appreciate the committee's prompt consideration of our proposal. I believe Mr. Newcomb also has a brief statement, after which we would be happy to respond to your questions. Thank you, sir.

Chairman HAMILTON. Thank you, Mr. Matheson. Mr. Newcomb.

STATEMENT OF RICHARD NEWCOMB, DIRECTOR OF FOREIGN ASSETS CONTROL, DEPARTMENT OF THE TREASURY

Mr. NEWCOMB. Thank you, Mr. Chairman, members of the committee. I am also pleased to appear before this committee today to discuss the administration's proposed Iraq Claims Act of 1993.

The administration's proposed Iraq Claims Act of 1993 was developed to provide a fair and orderly system for satisfying the claims of U.S. nationals and the United States against Iraq. The Iraq Claims Act follows the standard procedure utilized in the United States in the past to address compensation of U.S. nationals in similar circumstances. The bill incorporates the best approach to compensation issues, one that will permit available compensation to be allocated equitably among similarly situated claimants. The bill authorizes adjudication of U.S. nationals' claims in a single forum, and permits the President to compensate claimants by vesting blocked Iraqi assets in the United States. We believe this approach far preferable to the piecemeal approach represented by legislation unfairly compensating only a small segment such as the proposed Secured Payment Act and a similar amendment of the State Authorization Bill pending in the Senate.

The Iraq Claims Act complements the U.N. compensation program, which was set up to handle claims resulting from Iraq's invasion and occupation of Kuwait. Like the U.N. program, it establishes a priority for noncommercial individual claims. In the Iraq Claims Act, priority is established for the noncommercial claims of Desert Shield and Desert Storm veterans and other individuals

arising out of Iraq's invasion and occupation of Kuwait. No other priorities are created by the Iraq Claims Act. All other similarly situated claimants are treated equally.

The equal treatment of similarly situated claimants stands in stark contrast to the preferential treatment that would be granted a small group under other legislative proposals. These counter-proposals would authorize payment of U.S. beneficiaries from funds on deposit in U.S. banks in accounts of foreign banks that issued or confirmed letters of credit, but are in conflict with settled principles of law. The Secured Payment Act would affect many current sanctions programs under the International Emergency Economic Powers Act—Libya and Yugoslavia, for example—as well as future programs. It could have unpredictable effects and undermine the effectiveness of these programs, as well as permanently changing traditionally accepted trade finance principles and practice. It creates an unfair precedent for one group of unsecured creditors, that is, businesses holding advised letters of credit at the expense of other unsecured creditors such as veterans and individuals, insurance companies, banks and businesses without letters of credit.

The Secured Payment Act provides beneficiaries of foreign-issued or foreign-confirmed letters of credit rights they do not now have under letter of credit law. Letter of credit law creates a fundamental difference in the obligations of banks that confirm, as opposed to advising, letters of credit. If a U.S. bank confirms a foreign letter of credit, it becomes legally obligated to pay the beneficiary if the credit terms are met. In contrast, where a beneficiary has a U.S.-advised foreign letter of credit, no U.S. bank is obligated to pay that beneficiary and the foreign letter of credit does not entitle the beneficiary to any funds held in the United States, as a matter of well-established law. Nevertheless, the Secured Payment Act gives U.S. beneficiaries of advised letters of credit, who deserve no greater priority than any other unsecured creditor, priority rights against blocked funds not granted by letter of credit law.

The Secured Payment Act grants a right to payment based on performance of the trade contract, not compliance with the letter of credit terms; and a right to payment from any funds of the foreign bank, not from an account of the foreign bank specified in the letter of credit.

As noted, the Iraq Claims Act does follow standard procedures utilized in the United States in the past. While some have questioned why we should proceed differently with respect to Iraq than with respect to Iran, it is important to recall that in the case of Iran, it was known at the outset that Iran had far greater assets blocked in the United States to satisfy claims. In contrast, Iraq is essentially bankrupt, with hundreds of billions of dollars in global claims, nearly $100 billion of which is prewar debt to banks throughout the world. The U.S. Government has the responsibility to safeguard the interest of all U.S. nationals' claims. Otherwise, some may receive full compensation while other equally deserving claimants receive little or nothing.

There is no reason that one class of unsecured creditors, those holding certain letters of credit, should rate more highly than individuals with death, injury or expropriation claims. However, the Secured Payment Act and similar proposals would give these unse-

cured business creditors higher priority than veterans and other individuals with equally valid and compelling claims for death or injury. The Secured Payment Act would compensate the letter of credit holders 100 percent at the expense of veterans and individuals, whose recoveries would be reduced or even eliminated so that a small group could receive full compensation.

We hope the members of the committee and the Congress will join us in supporting the inclusive and equitable approach taken in the Iraq Claims Act.

Thank you, Mr. Chairman, members of the committee. It was a pleasure to appear before this committee this morning.

AMOUNT OF IRAQI ASSETS BLOCKED

Chairman HAMILTON. Thank you for your testimony. We will just begin with a few questions.

What are the total amount of Iraqi assets that we've blocked?

Mr. NEWCOMB. Currently, we have approximately \$1.2 to \$1.3 billion blocked in the United States.

Chairman HAMILTON. And what's the estimated number of private and public claims?

Mr. NEWCOMB. We estimate the total worth of the claims to be in the neighborhood of \$4 to \$5 billion. That's based on our staff analysis and the census that was performed in the winter and spring of 1991 before the completion of operation Desert Storm.

NUMBER OF CLAIMS

Chairman HAMILTON. So there are far more claims than there are assets?

Mr. NEWCOMB. That's correct, Mr. Chairman.

Chairman HAMILTON. No claimant is going to receive full reimbursement for their losses under this Act, is that correct?

Mr. MATHESON. I think that's a very clear conclusion; yes.

Chairman HAMILTON. Now, there is an exception and that's U.S. service personnel who suffered war-related losses under \$100,000; is that correct?

Mr. MATHESON. They will not necessarily receive all of their claims, but they will be given priority first of all——

Chairman HAMILTON. Under this legislation?

Mr. MATHESON. Yes, in deciding the claim and secondly, that they will, as you just said, receive initial payment of up to \$100,000 for their claim.

Chairman HAMILTON. Now, you also decide, do you, to award all claimants \$10,000 first?

Mr. MATHESON. Yes. This is similar to existing procedures with respect to other claims programs that the Foreign Claims Settlement Commission has had.

EXISTING PRECEDENT ON PRIORITIZING CLAIMS

Chairman HAMILTON. There is precedent for this kind of prioritization, is that correct?

Mr. MATHESON. Indeed; yes.

Chairman HAMILTON. Does the process that you are putting into place here for Iraqi claims differ from the process established, say for Iran, under that claim settlement?

Mr. NEWCOMB. Well, there will be differences in some details, but the basic idea is the same, that the Foreign Claims Settlement Commission takes the claims and adjudicates them, and then payment is made on the basis of pro rata distribution.

THE JURISDICTION OF THE U.N. COMMISSION ON CLAIMS

Chairman HAMILTON. All right. I'm not clear as to the difference in jurisdiction between the U.N. and the U.S. Commission. We will freeze the assets, the United States. We froze the assets, right? We control the assets, is that correct?

Mr. MATHESON. Yes, that's correct.

Chairman HAMILTON. Does the United States or the U.N. set up a commission?

Mr. MATHESON. The basic difference is this——

Chairman HAMILTON. Sort this out for me, if you would.

Mr. MATHESON. Yes, sir. The basic difference is this: the U.N. Commission was created to deal with war claims, that is claims resulting from the invasion and occupation of Kuwait, and so the jurisdiction of the U.N. Commission is limited to that category of claims. However, of course, there are a great many more American claimants with prewar obligations and debts; and, therefore, we have control, as you said, over the assets frozen in the United States. And this bill proposes to use them to compensate those claimants who are not within the U.N. program.

KIND OF ASSETS U.N. COMMISSION HAS TO DISTRIBUTE

Chairman HAMILTON. What kind of assets does the U.N. have to distribute?

Mr. MATHESON. The Security Council has decided that its compensation program will be financed from a percentage of future Iraqi oil exports.

Chairman HAMILTON. So, they don't have any assets now because Iraq hasn't agreed to that.

Mr. MATHESON. They have a small amount of assets which represent oil proceeds from shipments that had been frozen at the time of the beginning of the war. This is a relatively small amount. It's enough to keep the compensation commission running, but it's not enough to provide compensation. So the great bulk of the funds that will be available in the U.N. process will come from future Iraqi oil exports.

OUTSTANDING JUDGEMENTS AGAINST FROZEN ASSETS

Chairman HAMILTON. Now, you've got a number of U.S. claimants that have gone to the courts. Have any of them gotten judgements at this point?

Mr. MATHESON. Yes.

Chairman HAMILTON. And they are trying to get in line ahead of everybody else, is that correct?

Mr. MATHESON. Some of them, yes.

Chairman HAMILTON. Can they do that through a court decree?

Mr. MATHESON. Our argument is that they cannot. Maybe Mr. Newcomb would like to explain this in more detail, but our view is that they can only proceed to the extent they've been licensed by the Treasury Department, which does not include execution of judgements against the frozen assets.

Chairman HAMILTON. So the judgement is unenforceable?

Mr. MATHESON. Well, that's the U.S. argument. Litigants take a different view in the——

Chairman HAMILTON. Sure.

Mr. MATHESON [continuing]. Courts and that's what the courts are trying to decide.

Chairman HAMILTON. I see. Did you want to comment on that Mr. Newcomb?

Mr. NEWCOMB. Mr. Chairman, not in much greater detail than Mr. Matheson already has. Inasmuch as we are parties, defendants or appellants in a variety of litigations. And as a party, I don't feel it's appropriate for me to be commenting on matters pending in litigation. I subscribe to the views that Mr. Matheson stated.

Chairman HAMILTON. OK. Mr. Bereuter.

THE NATURE OF CLAIMS PERSONNEL FROM DESERT STORM/DESERT SHIELD FILE

Mr. BEREUTER. Thank you, Mr. Chairman. First, let me say I appreciate this opportunity for a hearing so that we can raise questions for the administration's witnesses. I would—I very much like to have had it include some of the commercial interest claimants. I think that would give us a better, more complete perspective on the issue.

I told the witnesses yesterday when I met with them that I felt that they were responsible for abuse of the legislative process trying to push this legislation through without hearings, which was nearly the case last week. But, the chairman responded immediately to my concerns and complaints about the lack of discussion on the issue, which I very much appreciate. I have a series of questions and I would appreciate it if you could be concise in your response so I can get through as many as possible.

The first question is: what kind of claims do personnel from Desert Storm/Desert Shield file—or what are the nature of their claims? I'm trying to grasp how it is that our personnel can sue the enemy.

Mr. MATHESON. First of all, those who have been killed—their next of kin would presumably have wrongful death claims for their death. Those who are injured would have claims for medical expenses for pain and suffering, and there may have been other personal property losses as a result of their activities there.

WHEN WAS THE PRECEDENT THAT ENABLES SERVICEMEN TO SUE THE ENEMY ESTABLISHED?

Mr. BEREUTER. When was this precedent established that our personnel are able to sue the enemy for damage, say received in the course of a conflict?

Mr. MATHESON. It's not the usual case. But the U.N. Security Council has decided that Iraq is indeed liable for the consequences of the war. It has not given the Compensation Commission jurisdic-

tion to reimburse these particular category of expenses, but it has clearly established that Iraq is responsible for all of the consequences of that invasion.

Mr. BEREUTER. Have your servicemen ever been able to sue for damages in which the United States was involved in a conflict before?

Mr. MATHESON. I think there have been cases where they have been able to recover from assets we have. But it's difficult to sue a foreign government because of various legal restrictions.

Mr. BEREUTER. Have they, in fact, recovered from assets that we have frozen or—to which we otherwise have access after a conflict?

Mr. MATHESON. I will need to look at the record and give you an answer specifically on that as to whether they have, in fact, recovered previously.[1]

Mr. BEREUTER. Thank you. I think that's a very important question. I'm sympathetic to the concerns and issues that—the losses that our personnel and their families received, some of them death. But, I'm wondering—it strikes me—that I've never heard of this before.

Mr. MATHESON. Let me point out one recent case, and that is the attack on the U.S.S. *Stark*.

U.S.S. STARK VICTIMS PREFERENCE VERSUS DESERT STORM/DESERT SHIELD

Mr. BEREUTER. My question, as a matter of fact, how do the U.S.S. *Stark* victims and their families relate to the Desert Storm/Desert Shield? Are they also given preferential treatment with this legislative passage?

Mr. MATHESON. We looked at that provision and it doesn't presently give them that preference. We wouldn't object if the committee wished to have them share in the same preference as the Gulf War veterans.

Mr. BEREUTER. So there is no priority for the U.S.S. *Stark* victims who were damaged or killed when we were not in a conflict with Iraq?

Mr. MATHESON. It's not provided for in this legislation, but we would not object to that preference. What I was going to say about the U.S.S. *Stark* victims was that it was one clear example where a military attack was made upon a U.S. armed services unit, and we insisted upon and received compensation from Iraq for the wrongful death of those individuals.

And I'm told, while you were asking your last question, that, in fact, there are other precedents for recovery by U.S. Armed Forces. We could either have them described right now or we could provide that for the record, as you wish.

Mr. BEREUTER. What is your preference, Mr. Chairman?

PRECEDENT FOR RECOVERY BY U.S. ARMED FORCES

Chairman HAMILTON. Can you briefly at least summarize the precedent?

Mr. MATHESON. Yes. This is Mr. Bradley of the Foreign Claims Settlement Commission.

[1] The information appears in the appendix.

Mr. BRADLEY. Mr. Chairman and Mr. Bereuter, the precedent is provided for in the War Claims Act of 1948. Specifically, German and Japanese assets that had been seized and liquidated under the Trading with the Enemy Act were used to compensate servicemen who were held as prisoners of war by the Germans and the Japanese in World War II.

Mr. BEREUTER. Are there any actions subsequent to World War II claims?

Mr. BRADLEY. Not with enemy assets; no, sir.

Mr. BEREUTER. Thank you. Mr. Newcomb or Mr. Matheson, it is my understanding that the Department of Treasury, Office of Foreign Assets Control is currently appealing a Federal District Court ruling in which a judge ruled on behalf of a U.S. exporter which argued that it was entitled to collect money frozen by executive order on August 2, 1990; and, therefore, that those assets should be considered outside the pool of assets which you intend to distribute through this legislation. Is that correct?

Mr. NEWCOMB. Congressman, yes. We are now——

Mr. BEREUTER. All right.

Mr. NEWCOMB [continuing]. In litigation?

Mr. BEREUTER. Now, let me go to the second part of the question, if it's correct. Mr. Newcomb, and specifically, in that case, it is my understanding that the U.S. exporter has not even shipped the goods on which it was entitled to collect. Aren't there many U.S. exporters with legal arguments stronger than that exporter, that is to say they had already shipped goods under a letter of credit, which would be precluded from making the same legal argument if this legislation is passed?

Mr. NEWCOMB. In response to that, I really don't feel I can answer on matters that are in litigation, other than to say it is a matter that is in the courts. It is on appeal. I think one thing——

Mr. BEREUTER. We're not asking——

Mr. NEWCOMB [continuing]. That characterizes the distinctions in these letters of credit trade-type cases is that they're all very fact-intensive and clearly, there are differences in all of them.

Mr. MATHESON. Could I add one thing, and that is that this legislation was not drafted to deal with the litigation. It doesn't deal with the litigation. It would be necessary, in our view, whether there had been such litigation, it would be necessary whatever the outcome of that litigation. And that litigation is trying to deal with a separate question, which is what assets are subject to Treasury regulation and which are part of the pool. The legislation would be needed in any case.

Mr. BEREUTER. Well, gentlemen, as I think you know, I am not asking you to comment on the case that has been litigated. I'm asking you if, in fact, a case that can be made by other exporters isn't stronger than the one that was—in which was won by the exporter. And I gather that is going to be a rhetorical question.

PURPOSE OF LEGISLATION

Mr. MATHESON. Well, I think that may very well be. The point is that this legislation doesn't address that. It simply refers all claims to the Foreign Claims Settlement Commission, which will

decide which are meritorious, and then assets will be distributed to those who are thought to have meritorious claims.

Mr. BEREUTER. Mr. Chairman, may I proceed or do you want to go to the 5-minute rule?

Chairman HAMILTON. Well, I want to give ample time so everyone has an understanding of this. Maybe I should go to some of the others.

Mr. BEREUTER. All right.

Chairman HAMILTON. After everyone's finished I'll come back and we'll give you additional time.

Mr. BEREUTER. That's fine.

Mr. MATHESON. Mr. Chairman, can I just make one observation?

Chairman HAMILTON. Certainly.

Mr. MATHESON. And that is that I can only speak for myself and Mr. Newcomb. But we certainly do not have any problem whatsoever with a full and complete hearing of all of these issues. We have not tried to preclude that in any way.

Chairman HAMILTON. Well, I might just say the Chair was confronted with a problem here and we had many, many possible witnesses for this hearing—a very large number—and so, we restricted it to administration witnesses. I understand that some may not agree with that decision, but I didn't see any other way to do it and to move the legislation along promptly. Mr. Bereuter.

Mr. BEREUTER. Mr. Chairman, not commenting on that, I'm just thinking about the previous answer. I think the answer is clearly what you say it is: you are not precluding this opportunity. But what you are doing, of course, is draining the assets that are available, so that people that have these opportunities to win in court will not have any assets to claim. Thank you.

Chairman HAMILTON. Mr. Lantos.

STATEMENT BY MR. LANTOS CONCERNING HIS CONSTITUENT'S PRIVATE CLAIM

Mr. LANTOS. Thank you, Mr. Chairman. I would like initially to identify myself as in agreement with many of the comments of my friend from Nebraska with respect to this entire matter. I would like to ask that a statement from a Desert Shield/Desert Storm veteran, Mr. Anthony Lewis, who is a constituent of mine, be entered in the record, Mr. Chairman.

Chairman HAMILTON. Without objection.

[The prepared statement of Mr. Lewis appears in the appendix.]

Mr. LANTOS. I would like to thank you, Mr. Chairman. I would like to read a paragraph from that statement; then ask a couple of questions. In part, Mr. Lewis says the following:

"I am outraged by the treatment my company has received from the Treasury Department's Office of Foreign Assets Control and I urge this committee to take action on this issue. First, let me assure you that I have no sympathy for Saddam Hussein and no quarrel with the President's authority to freeze Iraqi assets. As a colonel in the Air National Guard, I spent 10 months with Operation Desert Shield and Desert Storm flying combat refueling missions over Iraq. I flew 37 missions, including the first 30 of the war when Desert Shield turned into Desert Storm. We flew at low altitude to avoid radar. Later on, I took part of a wing. Again, no one

supports sanctions against the Iraqi Government more than I do. Now that my service is over, I resumed my career with Kleinberger Company as president." Then, he goes on to describe his case.

I fully realize, Mr. Chairman, that we have time limitations. But since the Iraqi war ended a long time ago, I think it would be desirable to give an opportunity to individuals, such as a decorated colonel in the Air National Guard who participated in the Persian Gulf War, to make his case in person. But, this clearly is a decision that you will have to make.

I have one specific question of both of you gentlemen. One relates to your comment, Mr. Matheson, about victims of the U.S.S. *Stark* outrage. As I recall, you said a minute ago that you have no objections to those people being given preferential treatment. Why didn't you include those in the legislation?

Mr. MATHESON. Well, frankly, in drafting the provision for priority, we were focusing on the Gulf War victims. And at that point, we had not focused on whether we were going to treat the U.S.S. *Stark* claims as U.S. Government claims or private claims.

Mr. LANTOS. So, it was an oversight.

Mr. MATHESON. I think that's fair to say.

Mr. LANTOS. Well, would it not be appropriate for you to propose that those individuals be included? These are American service people who were attacked unprovoked by Iraq; who lost their lives. And because you folks have engaged in an oversight, for you to sit here and tell us that you have no objections to those people being included, is a very arrogant and uppity statement. What I think you should say is that you are very sorry that those people were not included, it was a mistake not to include them, and you ask the committee to include them in the legislation. Wouldn't that be a more appropriate posture to take?

Mr. MATHESON. We'd be very happy for the committee to include them in that priority. I would like to point out, of course, that these are individuals who have already had their death claims compensated by——

Mr. LANTOS. I'm fully aware of that.

Mr. MATHESON. Right. So, we're talking about the injury claims. But, nonetheless, it's quite true that they are in the same posture; they have the same equities that the Persian Gulf War veterans have.

Mr. LANTOS. And they should have been included in the legislation.

Mr. MATHESON. Yes, I think so.

Mr. LANTOS. OK.

Mr. MATHESON. Well, they're included in the legislation. They should have been included in the priority.

Mr. LANTOS. In the priority category.

Mr. MATHESON. Yes.

Mr. BURTON. Will the gentleman yield?

Mr. LANTOS. In just one second, I'll be happy to yield to my friend. Mr. Newcomb, do you agree with that statement?

Mr. NEWCOMB. About the priority for these——

Mr. LANTOS. That this was an oversight, that they should be included, and we are requesting that they be included.

Mr. NEWCOMB. Yes, thank you for clearing that statement.

Mr. LANTOS. OK. I'm happy to yield to my friend.

Mr. BURTON. Yes. I'd just like to say that $2 million in this Kleinberger issue is a lot of fees and a lot of money. And it seems to me that this has been a problem for them for a long time. If a businessman in the United States of America has $2 million in assets and he invests those at the current rate of interest, say 4 percent even, you're looking at $80,000 in a year that's lost as income. I don't know if it's possible or not to help a company like Kleinberger to get restitution. But it seems to me that the $2 million should be unfrozen and if it's possible, there should be interest paid on that money as well because they've lost. They've lost money over the past, what, year because of this policy.

Mr. MATHESON. Mr. Chairman, may I comment that we want to provide a forum for all American claimants who have claims against Iraq. We just want them all to be treated the same, fairly and equitably.

Mr. LANTOS. We are all in favor of equitable treatment. If I may reclaim my time, I have one macroquestion. It stems from the tenor of your presentations, which disturbs me a great deal. What is the value of Iraq's oil assets in the ground? The current estimated value?

Mr. MATHESON. I don't know, but they are obviously very considerable.

Mr. LANTOS. Why then do we take the position that there won't be adequate funds to satisfy in total all claims? You made a very significant point of the hundred billion dollar figure. You emphasized that it's billion with a "b." We fully understand that.

Now, Iraq's oil assets are astronomical. And if the U.S. Government officially takes the position that legitimate claims which came about as a result of the outrages of Saddam Hussein cannot be satisfied in total, it sets a singularly negative and unfortunate climate. I would like the both of you gentlemen to explain to me this defeatist, negative and, in my view, totally erroneous posture taken by our Government.

Mr. MATHESON. Let me be very clear. We believe that Iraq is liable in full for all of the damages and all of the legitimate claims which Americans have.

Mr. LANTOS. But this is the first time you said that, Mr. Matheson. You haven't said that in your opening statement.

Mr. MATHESON. Well, let me say it again. We believe Iraq is liable in full for all of the legitimate claims of American nationals, both war and prewar. What I was trying to do, though, was to make sure that I was giving a realistic appraisal to the committee of what the real benefit would be to claimants of the mechanism we're proposing in this legislation. All we're proposing to do in this legislation is to provide a mechanism to take and to distribute the frozen assets which we have in the United States, and I wanted to make sure that the committee understood that that pool of assets alone would not be sufficient to pay in full all of the claims.

Mr. LANTOS. We fully understand that. But, I think it's equally important for our Government to take an absolutely firm and uncompromising position which, prior to my question, the two government witnesses have not taken. I'm glad to hear you take it now.

Mr. MATHESON. I do.

Mr. NEWCOMB. Can I comment on that also, Congressman? I certainly concur on the statement you made. I think this legislation needs to be looked at in the context of adjudicating the claims so that a group like the Foreign Claims Settlement Commission can hear the claims and pass on the merits of those claims. The payment is a separate question and I concur with what Mr. Matheson has said and you have said: the payment becomes a separate issue. We view these as the pool of assets we'll look to. But, we would certainly be very interested in having full payment, 100 cents on the dollar, for all of these claims.

Mr. LANTOS. We're much more than very interested, I think. We, as a government, have to insist on that. Iraq will have plenty of assets to satisfy all the legitimate claimants. Some of us still remember vividly the Jordanian border where thousands of desperate refugees were being driven out of the country with their clothes on their back, having left behind homes, bank accounts, what have you, and being driven to the Philippines or Pakistan or Egypt or a dozen other places. I think it's important we take a firm governmental position that every dime legitimately claimed is to be covered by Iraq. Thank you, Mr. Chairman.

Chairman HAMILTON. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. I want to commend you for giving us an opportunity to have at least this portion of the hearing with our panel of expert government witnesses and we welcome them. Although, I would have preferred, however, a longer list of witnesses representing a cross section of claimants and other companies with an interest in the legislation. I had hoped that they would at least have further opportunities for submitting statements. I'm pleased to include some of the statements to date, Mr. Chairman.

Chairman HAMILTON. The Chair would be happy to do that.

FUNDS AVAILABLE

Mr. GILMAN. Thank you, Mr. Chairman. Gentlemen, what has been the urgency of this legislation? Why are we rushing headlong into this? We still don't have a full account of all of the funds that are available. We don't—I don't think we've received any money yet from the U.N. Claims Commission, have we? Nor do we have an estimate of what additional funds will be available. So, I'm at a loss to understand why we are urgently rushing ahead in this Foreign Claims Act. Can you explain that to us?

Mr. MATHESON. Well, first of all, I think it's probably not entirely fair to say that we're rushing. The legislation actually was introduced a year ago by the previous administration. And our only point is that the quicker we can have a process that is functioning which will begin to adjudicate these claims and to distribute the assets, the better off the American claimants will be.

Mr. GILMAN. But, we're distributing assets that we have frozen. And yet, we—have we received any of the funds from the U.N. Claims Commission?

Mr. MATHESON. Oh, no, we have not. But, I'm referring to the——

Mr. GILMAN. Do we know what we will be receiving from them?

Mr. MATHESON. No, we don't have that because they have not yet made their decisions.

Mr. GILMAN. But, then, we're going to have to go back again after you distribute what funds are frozen and then do another redistribution. Is that right, when we receive any further funds?

Mr. MATHESON. Well, actually, those are two separate processes which will be independent of one another. The U.N. process will be dealing with war claims and——

Mr. GILMAN. No, I understand that the U.N. takes care of the war claims.

Mr. MATHESON. Right. OK.

Mr. GILMAN. But doesn't the U.N. fund provide us with funds to take care of our other claims?

Mr. MATHESON. Only the war claims.

Mr. GILMAN. Only—so, then, we won't——

Mr. MATHESON. Only the war claims.

Mr. GILMAN [continuing]. Receive any more from the U.N. fund?

Mr. MATHESON. Only for the war claims. So that for prewar claims, we have to have our own procedures which will operate independently, and that's why there's no need to wait for the U.N. to try and do justice to Americans who have prewar claims.

Mr. GILMAN. Now, it was my understanding, and please correct me if I'm wrong, that the funds that would be received by Iraq from the sale of oil would be utilized to take care of all claims. Is that right or am I wrong?

Mr. MATHESON. No. The Security Council decisions subtract 30 percent from future Iraqi oil exports, but they're for the U.N. Commission to deal with war claims.

Mr. GILMAN. Only with war claims?

Mr. MATHESON. That's right. There's no separate mechanism——

Mr. GILMAN. Do any of the prewar claims have to be limited to this $1 or 2 billion fund that we've frozen?

Mr. MATHESON. I won't say that. It's just that the U.N. mechanism doesn't provide a means of recovery for those.

Mr. GILMAN. Now, you say you won't say that. What other funds will be available?

Mr. MATHESON. Well, there may or may not be other sources of funds available.

Mr. GILMAN. In all probability, there will not be other funds. Is that correct?

Mr. MATHESON. Well, I can't point you to any reasonable likelihood. But, the U.N. system doesn't preclude it. In fact, the U.N. system says that Iraq is liable to pay its claims.

Mr. GILMAN. Well, have we been negotiating with Iraq for additional funds?

Mr. MATHESON. Well, I don't think you can say we've been negotiating with Iraq about anything. Our relationships with Iraq have been——

Mr. GILMAN. Do we intend to negotiate with Iraq for additional funds to take care of our prewar claims?

Mr. MATHESON. I would say that if we ever get to a situation where we're in a position to negotiate with Iraq about anything, and that would probably require some significant political changes

in Iraq, then, yes, it would be logical for us to demand additional amounts for U.S. claims.

Mr. GILMAN. So at that time, you then have to go through this process all over again. Is that right?

Mr. MATHESON. If that was possible, we would. But, I think there is no reason to hold up the distribution of the assets we have against this—what I think you'd have to say is a rather remote possibility at the present time of negotiating an adequate solution with Iraq on the rest of the liability. I think we need to act now to do what we can for American claimants with the assets we have.

NUMBER OF EXISTING CLAIMS

Mr. GILMAN. Seems like we're going to be reinventing the wheel at a later date and going through an unnecessary duplication. Mr. Matheson, do we have a full inventory of the possible claimants and claims against Iraq?

Mr. MATHESON. Well, what we have is Treasury's solicitation back in 1991 of claims against Iraq, which may not be complete because additional claims may have arisen since the time of that survey.

Mr. GILMAN. What is the total of those existing claims?

Mr. NEWCOMB. Let me say, based on our analysis, we view it to be worth between $4 to $5 billion.

Mr. GILMAN. I'm sorry, I didn't hear you.

Mr. NEWCOMB. $4 to $5 billion, based on our staff analysis.

Mr. MATHESON. Which includes both war claims and prewar claims?

Mr. NEWCOMB. That's right. That's what's being——

Mr. GILMAN. And the total frozen, you indicated as what? About one-and-a-half——

Mr. NEWCOMB. $1.2 to $1.3 billion.

Mr. GILMAN. Is it total value of the claims that have been filed by U.S. claimants?

Mr. NEWCOMB. That's correct.

Mr. GILMAN. The figure you gave as the——

Mr. NEWCOMB. Yes. That total was from——

Mr. GILMAN. And that's all——

Mr. NEWCOMB. Let me clarify that. There were 1,100 claims filed. These were filed—the census was taken in the winter and spring of 1991 of claims that were in existence at that time. Some of them arose—could have arisen after Iraq's invasion of Kuwait. Some—most arose before Iraq's invasion of Kuwait.

Mr. GILMAN. Do we have a current inventory?

Mr. NEWCOMB. The most current inventory we have is that figure I gave you in the spring of 1991.

Mr. GILMAN. In 1991?

Mr. NEWCOMB. Yes, sir.

Mr. GILMAN. So, there could be an substantial number since that date?

Mr. NEWCOMB. There could be, but I don't have reason to believe that there are. The number may change, but I think those figures are reasonable for purposes of our planning in this hearing.

Mr. MATHESON. Now in an entirely separate channel, we have, of course, the claims which have been submitted to the U.N. Com-

mission for war losses, and we can give you a detailed summary of those as well.

Mr. GILMAN. I would welcome if you could present to us a current inventory of all the claims that have been filed. With your permission, Mr. Chairman, I'd like to have that made part of the record.

Chairman HAMILTON. Without objection.

[The information referred to appears in the appendix.]

Mr. GILMAN. Thank you, Mr. Chairman, that—thank you, Mr. Chairman. I know my time is exceeded.

FOREIGN CLAIMS SETTLEMENT COMMISSION

Chairman HAMILTON. Mr. Hastings.

Mr. HASTINGS. Thank you, very much, Mr. Chairman. I welcome the witnesses as others have and I, too, have some concerns that I would like to put to you. The general proposition, I have no problem supporting. Obviously, this legislation is well-intentioned. I do suggest to you, though, in its present form, it's going to create a substantial amount of litigation. So, Mr. Matheson, perhaps I should direct my immediate query to you. But as a segue to my colleague, Mr. Gilman, I was interested in the anticipated number of claimants, inclusive of ongoing claims in the—that are in litigation, not just claims made to the so-called Commission, which leads me to yet another question. In the legislation, the language is used, "United States Commission." I understand and you understand that to be, and correct me if I'm in error, the U.S. Foreign Claims Settlement Commission. Am I right?

Mr. MATHESON. Yes, that's right.

Mr. HASTINGS. Well, you see, there are a lot of U.S. Commissions. We ought to say exactly what it is in this legislation. That's just scribing stuff, but it's something that may lead one to have to go to other books to find out what it is that you're talking about. Do you understand what I'm saying?

Mr. MATHESON. I do, and I think if you look in the committee version, you will find a definition of the U.S. Commission at the very end as the Foreign Claims Settlement Commission of the United States.

Mr. HASTINGS. All right. OK. I have no problems with that. Did you or anyone else from your departments talk with Chief Justice Rehnquist or his appropriate designees regarding multidistrict litigation and how it's handled in the U.S. district courts?

Mr. MATHESON. I don't know whether others have, but I certainly have not.

Mr. HASTINGS. Might I suggest that you would have wanted to do so. If we use the Agent Orange cases or the asbestos cases as a framework for what I'm talking about, the U.S. district court, once it recognizes that a substantial caseload is about to take place, has in place the ability to undertake multidistrict litigation and assign it appropriately and adjudicate all claims thus in that forum. We're creating another forum. And in creating another forum, the likelihood is very strong that we're going to create a substantial amount of litigation.

What's the appellate process for this litigation? Is it the process that is under the U.S. Foreign Claims Settlement Commission? Is that where the appellate process lies?

Mr. MATHESON. Well, this process is exactly the same in that regard as the Foreign Claims Settlement Commission's work in previous claims programs approved by the Congress.

Mr. HASTINGS. When they adjudicate something, is it final?

Mr. MATHESON. Yes.

Mr. HASTINGS. Then this is not like bankruptcy, then, in some respects, and I'm not suggesting that you said it is——

Mr. MATHESON. Fair enough.

Mr. HASTINGS [continuing]. Because as an analog, bankruptcy, at the very least, does have an appellate process. There is no appellate process. Once the Settlement Commission makes its decision, over and out.

Mr. MATHESON. Yes, that's a fair statement. And it is, as I say, not a new forum, not a new procedure, but the same procedure that has been used in many prior Foreign Claims programs by the Foreign Claims Settlement Commission.

INFORMING POTENTIAL CLAIMANTS

Mr. HASTINGS. All right. My final area of query, Mr. Chairman, with your permission, has to do with the publication. The bill calls for publication to be made in the Federal Register. You and I understand that dynamic, and the likelihood is strong that many newspapers in the country and others will pick it up. But if that is all that we're going to by way of publication, I liken it to my publication of a husband that we couldn't find in a divorce by publishing it in the local paper, knowing full well that he lived somewhere in another jurisdiction.

We need to undertake a better mechanism to inform potential claimants that they have a right to come in within that 1-year statute, which I disagree with also. I think it should have been a 2-year statute. Thank you, very much, Mr. Chairman.

Mr. MATHESON. Well, it's also in our interest to make sure that all claimants are brought into the process. So, we'd welcome any suggestions.

Chairman HAMILTON. Mr. Manzullo.

JURISDICTION OF THE U.N. COMMISSION

Mr. MANZULLO. Thank you, Mr. Chairman. As I understand it, there are two commissions. There is the U.N. Commission, which is to provide compensation to prisoners of war, along with other claims. Is that correct?

Mr. MATHESON. It's basically to provide compensation for war claims, and that includes prisoners of war whose rights have been violated under the Geneva Conventions.

Mr. MANZULLO. An American soldier who was shot in the Gulf War has no redress under the U.N. Commission. Is that correct?

Mr. MATHESON. With one exception, and that is where his rights under the Geneva Conventions have been violated. With that one exception, it's correct that the U.N. Commission does not cover those claims.

Mr. MANZULLO. An American soldier who was shot in the Gulf War and who was not taken as prisoner of war has no compensation under the U.N. Commission. Is that correct?

Mr. MATHESON. That's correct.

Mr. MANZULLO. Why not?

Mr. MATHESON. This is, in fact, an issue which I argued personally before the U.N. Commission Governing Council, and I did not succeed.

Mr. MANZULLO. When was that argument?

Mr. MATHESON. During 1991 and 1992.

Mr. MANZULLO. Is that forum or debate still open to irate members of Congress, including this one here?

Mr. MATHESON. Well, the Governing Council did make a decision. They could theoretically revise it, though I would not hold out any prospect for that.

Mr. MANZULLO. Well, my question to you, then, is that the American soldier who was injured by a bullet, or otherwise, in the Gulf War and who was not taken POW, has his redress for his injuries available under this $1.2 billion in frozen Iraqi assets. Is that correct?

Mr. MATHESON. Yes, together with whatever other government benefits that are provided by the United States.

Mr. MANZULLO. That's correct. How many of those soldiers are standing in line to claim benefits to this $1.2 billion?

Mr. MATHESON. I don't have the precise figures, but my understanding is that there were nearly 400 killed and perhaps over 1,000 with serious injuries. And that's the reason why we want to give these people priority in seeking recovery under this legislation.

KUWAIT'S CONTRIBUTION TO CLAIMANTS

Mr. MANZULLO. My suggestion, there's number one, $1.2 billion will not be enough to cover the American soldiers who were injured over there. Secondly, that means there would be no money left over for commercial claims. Third of all, has anybody asked Kuwait, on behalf on whose government and in protection of whose territory these young men and women shed their blood, to provide funds to pay for the injuries to American soldiers?

Mr. MATHESON. Well, Kuwait did, of course, contribute very substantial amounts to the war effort and, of course, suffered a tremendous amount of damage themselves.

Mr. MANZULLO. They have a lot more money than this government does. What I'm talking about is young men and women who died from this country protecting that country. Has there been any negotiation with Kuwait to provide additional compensation for these soldiers who suffered, or whose family suffered the loss of their loved one, or the soldiers that suffered injuries?

Mr. MATHESON. I'm not aware of any specific negotiation along those lines.

Mr. MANZULLO. My suggestion is that this legislation be held in abeyance until the U.S. Congress can enter into negotiations with the government of Kuwait, because my fear is that this $1.2 billion will not come anywhere near compensating our soldiers. There would be nothing left over for commercial claims. And under this legislation, this precludes any further actions in the courts against

Iraq; that this will be the only pot of money out of which commercial claims can be satisfied; and that 10 years down the line when this government grants MFN status to Iraq because it promises to be a good boy, that any assets of Iraq in this country could, therefore, not be garnished. Would that be correct?

PRECISE NUMBERS OF INJURIES AND DEATHS

Mr. MATHESON. Well, two observations. One is that we are talking, again, about somewhat less than 400 deaths and somewhat more than 1,000 serious injuries. I don't think that you would find that if you take past precedent, like the U.S.S. *Stark* case, that would really come anywhere near to exhaust——

Mr. MANZULLO. 400 deaths and 4,000 injuries?

Mr. MATHESON. 1,000.

Mr. MANZULLO. 1,000 injuries would not come anywhere near 1.2 billion?

Mr. MATHESON. Not according to prior precedent. If you take the U.S.S. *Stark*, for example, the amount of compensation was an average of something over $700,000 per dead sailor.

Mr. MANZULLO. So, $700,000 per dead sailor times how many soldiers do we have?

Mr. MATHESON. 400.

Mr. MANZULLO. What does that come out to?

Mr. MATHESON. I would have to——

Mr. MANZULLO. That's $280 billion.

Mr. MATHESON. $280 million. $280 million would be the precise figure.

Mr. MANZULLO. Twenty—well, that's the reason for the hearing, is to have the precise figures. And how about those that are injured?

Mr. MATHESON. OK. Would somebody like to do the arithmetic.

Mr. MANZULLO. I mean $280 million is not 20 percent of the pot. And how many injured? We have 4,000?

Mr. NEWCOMB. 1,000.

Mr. MATHESON. We're going to calculate the 400 dead times the $700,000 average compensation for the U.S.S. *Stark* victims.

Mr. NEWCOMB. $280 million.

Mr. MATHESON. $280 million.

Mr. MANZULLO. Then the 4,000 who are injured.

Mr. MATHESON. 1,000.

Mr. MANZULLO. 1,000 who are injured.

Mr. NEWCOMB. $40 million.

Mr. MANZULLO. That does not include those who are suffering mental problems. Those who are undergoing extensive counseling and treatment because of depression. Is that correct?

Mr. MATHESON. No. I assume the 1,000 is only serious physical injuries.

Mr. MANZULLO. Those are serious injuries. And how much of those average?

Mr. MATHESON. Well, that's very difficult to predict because the claims all vary substantially.

Mr. MANZULLO. Some have lost limbs; some have been blinded. Is that correct?

Mr. MATHESON. Yes, that's probably correct.

Mr. MANZULLO. So, I would suggest to you, as a person who practiced law for 22 years, that the $1.2 billion would easily be taken up in claims for American soldiers. What we're talking about here is no money being left over for commercial claims.

Mr. MATHESON. I don't believe that that's the judgement that we've come up with. But, I'll tell you what I will certainly do, is to provide for the record the information we have from the Department of Defense as to exactly the number of dead and injured, and any information we can give you about the possible recoveries.

Mr. MANZULLO. Is there reason why that wasn't ready today?

Mr. MATHESON. Well, we don't have all that information yet.

Mr. MANZULLO. I mean, who views it?

Mr. MATHESON. Department of Defense.

Mr. MANZULLO. This is a hearing in the U.S. House of Representatives to find out what we should do with this money.

Mr. MATHESON. Yes.

Mr. MANZULLO. And that's why you are here. Mr. Chairman, I appreciate that we're having hearings here. But, I think it's premature to move this legislation under the House of Representatives until we have all this information, with people from the appropriate agencies to answer the questions, and resume the hearings at a further time.

Mr. MATHESON. May I make two suggestions? First of all, you should understand that the priority in payment is only up to a sum of $100,000 per each person who has priority. That doesn't answer the question of how much money eventually would be available for all of these claims. But, that's the extent of the priority. Secondly, we have detailed figures here from the Department of Defense as to the number of persons injured and killed during the Desert Storm and Desert Shield operations.

Mr. MANZULLO. What does that show?

Mr. MATHESON. Well, it's a lengthy set of figures. I'd be glad to go through the whole——

Chairman HAMILTON. Could the gentleman do it in his next round. I appreciate it. I don't want to cut him off.

Mr. MANZULLO. That would be correct. I just think, Mr. Chairman, that we need further inquiry on this very delicate subject. I appreciate the fact that you gave us this opportunity. But, this area is so wide open and I have so many questions that perhaps you would consider at another time continuing these hearings.

Chairman HAMILTON. All right. Thank you, Mr. Manzullo. We will be glad to confer with you about this. Can we make this a part of the record?

Mr. MANZULLO. Yes.

Chairman HAMILTON. Without objection, that will be made part of the record.

Mr. Gejdenson.

[The information referred to appears in the appendix.]

CONSEQUENCES OF DELAYING LEGISLATION

Mr. GEJDENSON. Thank you, Mr. Chairman. Let me ask you a couple of questions here. Nothing in this legislation would preclude any American citizen or corporation from suing Iraq at a later date

for any portion or all of the funds they don't receive as a result of this Claim Settlement Act. Is that correct?

Mr. MATHESON. No, sir. In fact, there is a provision in the legislation that says that.

Mr. GEJDENSON. Nothing would prevent Mr. Manzullo or others, on their own initiatives from requesting from the Kuwaiti Government that they make a pot of money available for injured persons or corporations who lost as a result of the actions of the war?

Mr. MATHESON. The legislation makes clear that that is the case.

Mr. GEJDENSON. So that the only thing that would be achieved by delaying the legislation is that the individuals injured, either physically, mortally, or economically, would be delayed in getting any kind of compensation whatsoever?

Mr. MATHESON. That's correct.

Mr. GEJDENSON. Now, if we don't provide a priority for these individuals, what would happen in the course of things would be that the corporations with the largest legal staff would probably get the most amount of the money?

Mr. MATHESON. I think that's fair to say. It certainly is the case——

IRANIAN CLAIMS CASE

Mr. GEJDENSON. OK. And the difference between Iran and this instance is that in the case of Iran, there was more than adequate funds. And in this instance, we have about a fifth or a quarter of the funds that we need.

Mr. MATHESON. Yes, sir, that's true.

REASONS FOR EXPEDITING LEGISLATION

Mr. GEJDENSON. OK. And if there is somebody who feels that the U.S. Government took their property without due process, or the property wasn't really Iraqi property and shouldn't have been taken, they still have legal redress in the courts?

Mr. MATHESON. Yes, that's right, in the Court of Claims.

Mr. GEJDENSON. We are not precluding anybody's legal rights if they feel that they have wrongfully lost their property. We're not precluding anybody from suing the Iraqis if they feel they deserve additional compensation. We're not precluding anybody from requesting the Kuwaitis to provide an additional fund of money. The only thing that you're doing here is giving some priority to American soldiers who have been injured or killed in the war. You're making sure that there is a process where everybody will get something, and not just those with the fastest lawyers.

POOL OF IRAQI ASSETS

Mr. MATHESON. And we're taking a pool of Iraq assets that are presently not available and making it available to American claimants.

Mr. GEJDENSON. Well, Mr. Chairman, I don't know about other members of the committee, but it seems to me that not only the largest corporations with the largest legal staffs should benefit from this pool of money that the American Government has frozen. The assets should be used for all its citizens. Further, nothing in

this legislation precludes an individual from bringing an appeal to the courts if it feels its property was wrongly claimed. An individual could still have all his or her legal rights to sue the Iraqi Government or Saddam Hussein for additional redress. It seems to me, Mr. Chairman, that we ought to move as quickly as possible to aid those people who are waiting for at least some compensation, whether they're the family members of deceased soldiers or individuals with small holdings who could probably least of all afford continuing delays. We ought not to continue to delay this process; we ought to move expeditiously.

Mr. GILMAN. Would the gentleman yield?

Mr. GEJDENSON. I'll be happy to yield.

Mr. GILMAN. I welcome the gentleman's testimony. Does the gentleman or the witnesses, can they tell us—is there any statute of limitation on filing of the claims with regard to these four claims?

STATUTE OF LIMITATION ON CLAIMS

Mr. MATHESON. Presently, there is not. This program would establish a sort of a statute of limitation to file claims, but it's many years in the future.

Mr. GILMAN. Well, how many years in the future?

Mr. MATHESON. Over 9 years—nine years, plus a period of notification.

Mr. GILMAN. Nine years from the present—from the date of—the effective date of the legislation?

Mr. MATHESON. Well, I believe it runs from the last date on which funds are contributed into these compensation funds. So, it would be a substantial period.

Mr. GILMAN. Contributed by whom?

Mr. MATHESON. These are the time limits on which the funds will be available for recovery. The Foreign Claims Settlement Commission will probably have its own requirements for the submission of claims, which you will probably.

Mr. GILMAN. Now let me understand.

Mr. GEJDENSON. Reclaiming my time from the gentleman. I'm just short on time. I don't want to lose it all.

Mr. GILMAN. I thought you had finished with your time. I just would like to clarify any limitation on the filing of claims. You're now saying 9 years from the time of the funds being submitted?

Mr. MATHESON. There are two things. First, there's a question of when you have to file claims; and the second is when you can continue to recover.

Mr. GILMAN. All right. What's the limitation on filing claims?

Mr. MATHESON. There is none right now, but the Foreign Claims Settlement Commission would probably set one when it begins to work on the program.

Mr. GILMAN. Thank you. I'm just reclaiming my time back. Thank the gentleman.

Mr. GEJDENSON. I'm happy to do it. Again, I think that the administration is doing the right thing. It ought to press forward. We ought to get on with this. The longer we wait, the longer it will take for people to get any compensation at all. And I commend the chairman for his hearing and commend the witnesses for their testimony today.

Chairman HAMILTON. Mr. Burton.

Mr. BURTON. Good luck in collecting in a suit from Iraq. I mean, all this hyperbole about suing Iraq, Mr. Gejdenson, just is baloney.

Mr. GEJDENSON. Would the gentleman yield?

Mr. BURTON. Of course, I'll yield.

Mr. GEJDENSON. Thank you. I think the gentleman is correct, that it's highly unlikely that under the present administration of Iraq, there is going to be any recovery. But it seems to me that a number of your colleagues on your side—and on my side as well—were concerned about the fact that the administration hadn't gone after Saddam Hussein or hadn't asked him for additional contributions. There have also been discussions by one of your colleagues about Kuwait providing additional money.

The only point that I was making is the pool of money we have is the pool of money we have; and it's not likely that the government is going to get additional funds from them, especially with the international activity going on. So, we ought to resolve this pool of money. And then let's hope some day there's a different government in Iraq sooner than later, so that maybe some of these other claims can be settled.

TYPES OF CLAIMS

Mr. BURTON. The inference was that they would have some possibility of collecting the money, and I don't think that's possible and I don't think you do either. Let me just say that I'd like to know how many claims—commercial claims there are, and I think maybe somebody asked for that for the record. And I'd like to also know, you said that 30 percent of the oil sales—commercial oil sales from Iraq was going to go into the U.N. fund——

Mr. MATHESON. Yes, that's correct.

Mr. BURTON [continuing]. To be distributed. The United States, it seems to me, gave the most in both men and material and support for Kuwait in the Iraqi war. And I just don't understand why a certain percentage of that money isn't going for American claims, since we were the major participant in that conflict. What is that 30 percent going to go for?

Mr. MATHESON. The 30 percent goes for U.N. Compensation Commission claims, which are claims resulting from the invasion and occupation of Kuwait.

Mr. BURTON. How is that divvied up?

Mr. MATHESON. That would be divvied up on the basis of the merits of the claims, not on the basis of nationalities. And that's the way it should be.

Mr. BURTON. Well, but if the United States has a large number of commercial entities that lost money and a lot of military personnel that lost money, it seems to me that a certain percentage of that ought to be utilized to pay those claims.

Mr. MATHESON. Well, what we should get is recovery that matches our proportion of claims—of legitimate claims, and that's what will happen. But, there has been no attempt to set arbitrary quotas on the basis of nationality. That wouldn't be fair.

Mr. BURTON. I suppose it depends on how you look at fair. You know, who participated the most; who contributed the most; who produced—who contributed the most lives, and blood, and man-

power, and money and everything. The amount of money we spent in that war dwarfs—absolutely dwarfs everybody else. And the amount of money, and material and the amount of lives that were lost, and the sacrifice that was made dwarfs any other nation that was involved. I think everybody knows that. We were the major participant. And for you to say that we're going to get the same percentage as anybody else as far as claims are concerned, doesn't make much sense because the others didn't participate to the degree we did. And we—I just don't understand that rationale.

Mr. MATHESON. Well, as you know, we did receive very substantial contributions from other countries that participated in the effort. And, in fact, many of those contributed far more than what they would receive from this Compensation Commission. The purpose of the Compensation Commission was to provide relief and compensation to those who suffered losses, particularly the many individuals who suffered losses.

Mr. BURTON. What about the commercial entities as well?

Mr. MATHESON. And the commercial entities as well. But, it was not the purpose to reward countries for their contributions to the war effort. And——

Mr. BURTON. No, I'm not saying reward them. I'm saying that there ought to be a percentage based upon the participation as well. I don't think it should be simply because one nation came in there with a small number of people and had a few losses. They should participate to the same degree that the U.S. Government did. We put hundreds of million—billions of dollar into that effort.

Mr. MATHESON. We did and we were covered, a very substantial portion of that, from other allied countries. That was the mechanism by which we attempted to recover a fair contribution from other countries.

Mr. BURTON. Well, but I——

Mr. MATHESON. This is a different mechanism. This is intended to provide humanitarian compensation for those who suffered losses.

Mr. BURTON. Well, what I'd like to see, if it's possible from you folks, is the amount of money that the United States expended, the amount of money the United States returned—received back in compensation or participation from other countries, like Kuwait. I'd like to also see the amount of claims worldwide that the United States is—the United Nations is going to be adjudicating, and the amount of claims that the United States has both in personal and commercial claims, so that we could see really if we're getting the short end of the stick.

Because it seems every time we enter into a situation like this, American companies and American individuals do get the short end of the stick. And if there are payments made, compensations made, other people get theirs or a larger percentage than what we get for the amount of effort. I don't know if I'm making myself clear.

Mr. MATHESON. Yes. The figures on our expenditures versus contributions by other coalition states are on the record. We'll provide them again. We can also provide the number and amount of U.S.

claims to date and whatever estimates that we have, and they're only estimates, as to what the total might be.[2]

But let me emphasize again: the procedure by which we attempted to obtain fair contribution from other coalition states for the war effort was a separate effort. We got a lot of money. This is a different exercise. This is an exercise to compensate those individuals and companies who suffered particular damage.

Mr. BURTON. Well, I don't——

Mr. MATHESON. And the process——

Mr. BURTON [continuing]. Want to prolong this. I think we both understand where we're coming from. It just seems to me since we paid the biggest amount in both money, material and personnel, that when you start splitting up the 30 percent, it's going to come from the government of Iraq. The United States of America should not just be on a pro rata basis. It should be on the basis of how much we participated, how much we spent and it shouldn't be just simply divvied up on a percentage basis. And I think that's what's going to happen and we're going to get the short end of the stick again.

OTHER COUNTRIES CONTRIBUTING TO THE WAR EFFORT

Chairman HAMILTON. Mr. Martinez.

Mr. MARTINEZ. Thank you, Mr. Chairman. I'd like to followup on a question that was asked by my colleague, Mr. Burton. When you said that the war effort—or our participation in that war effort, we received financial contributions from other countries as reparation for our overwhelming participation. Who are the other countries that contributed financially to our war effort?

Mr. MATHESON. Yes. I can't claim to be an expert on this, but this has all been well recorded and debated in other fora. But the Arab states and a number of the other Western states, including Japan and European countries, made very substantial contributions. And we can provide again for the record—again, it's not in my own particular jurisdiction, but this has been provided for the record on many occasions.

Mr. MARTINEZ. All right. Well, I'm sorry, I wasn't privy to that record and I wasn't a part of that debate. So, I'm asking the question now.

Mr. MATHESON. Sure.

Mr. MARTINEZ [continuing]. I would appreciate getting that information. In regard to that information, I want the total cost of our contribution, and then the percentages and the amounts of contribution by these other countries, because I've heard that before, too, where it seems like we always end up with the short end of the stick. And, you know, I think Mr. Burton is quite right when he says that, if it wasn't for U.S. involvement, I don't think they would not have even entered into this thing unless they knew they had the full support and the might of the United States. I mean, we may be the only super power able to provide that now.

But by the same token, if we're going to be the peace keepers of the world, other countries ought to bear up another kind of responsibility, and that is sharing the financial responsibility. And I don't

[2] The information referred to appears in the appendix.

consider it equitable if other countries get a greater percentage of their loss covered than we do. If you're talking about equity, you're talking about percentages coverage for loss. What is the 30 percent amount of the oil sales of Iraq?

Mr. MATHESON. Well, of course, we can only make estimates now, because they haven't resumed production. But if they get back to their prewar export figures, which is probably a reasonable judgement, there might be something like $20 billion per year of export revenues, in which case 30 percent is—what, $6 billion.

Mr. MARTINEZ. $6 billion?

Mr. MATHESON. Billion.

Mr. MARTINEZ. And how many years would this collection go on?

Mr. MATHESON. As long as the Security Council continues it in effect.

Mr. MARTINEZ. As long as the Security Council determines there are still claims coming back?

Mr. MATHESON. Right, continue until——

Mr. MARTINEZ. Mr. Gejdenson talked about suing Saddam Hussein. I don't think that would get anybody very much. And how would an individual do it? Could an individual would do it in an international court of some kind?

Mr. MATHESON. I think there would be a lot of difficulties in trying to do that. If you can find Iraqi assets somewhere, you might try to attach them.

Mr. MARTINEZ. Well, it's like here in the United States. You can find and get a judgement against someone who has done you wrong or damaged your property, and then the judge, in his ruling, says, "Well, you have the judgement now and now you have to go out and collect."

Mr. MATHESON. Yes.

Mr. MARTINEZ. And so, you have to attach something——

Mr. MATHESON. Yes.

Mr. MARTINEZ [continuing]. Seize something. And then you have to go through a whole other cost to do that, you know. And I don't think that an individual, or even a company for that matter, is going to have much success with Saddam Hussein. Initially in your written testimony, you had made the statement, and I want clarification of this, "Prewar claims"—prewar, those claims that people had against Iraq prior to the war, which had nothing to do with the war—"are expected greatly to exceed the value of frozen Iraqi assets," which is $1.2 billion we were talking about in frozen assets.

Mr. MATHESON. Yes.

Mr. MARTINEZ. Well, if prewar claims are greatly expected to exceed the value of the frozen assets, and you say that worldwide invasion-related claims—that's invasion-related claims—before the U.N. are expected to exceed $100 billion, and you're going to collect $6 million a year toward that, I think it becomes very important as to how long legally anybody would be able to collect or how long Saddam Hussein would put up with you taking $6 billion annually of his money for these claims. He doesn't seem to be very cooperative in any of the other areas. How do we guarantee that he would be cooperative in this area?

Mr. MATHESON. Well, he can't export oil until he agrees to this deduction.

Mr. MARTINEZ. So, at any point in time that he fails to make a payment of that percentage, there'll be an embargo placed?

Mr. MATHESON. Well, the mechanism will collect those amounts automatically. There is a detailed set of regulations already developed for that purpose.

Mr. MARTINEZ. So that money is assured in coming forward?

Mr. MATHESON. That's right. As long as the oil exports occur, the money is assured.

SETTING PRIORITIES ON WHO COLLECTS FIRST

Mr. MARTINEZ. OK. If the prewar claims, I expect, greatly to exceed the frozen values in the United States, are we going to set priorities and who collects first?

Mr. MATHESON. Yes, that's correct.

Mr. MARTINEZ. And who is at the bottom end of the ladder?

Mr. MATHESON. Well, the only priority is for the individuals who suffered from the Persian Gulf War or the U.S.S. *Stark*——

Mr. MARTINEZ. Individuals?

Mr. MATHESON. Yes.

Mr. MARTINEZ. Military or civilian——

Mr. MATHESON. Military and civilian individuals, so that everyone else, if you want to put it that way, follows behind them; yes.

Mr. MARTINEZ. Let me ask you this: there were military people that came back who had passed physicals just before they went, and had taken shots and everything else to insulate them against anything they might come in contact with, and that didn't work because we know that Leishmaniasis (parasite in the tissues of the vertebrates) was developed by a lot of our military troops. Are these people eligible for this?

Mr. MATHESON. I don't honestly know the facts of the case. All I can say is if they have legitimate claims, the Foreign Claims Settlement Commission will consider them. But, I don't—I can't evaluate the specific case you described.

Mr. MARTINEZ. Well, then there's a whole group of people that I'm figuring are going to—if you can't answer that, so then evidently it's not been discussed a whole lot or have even been considered a whole lot, but then there's another group of people who are going to be equally left out. And that's those people who come back who weren't determined to have Leishmaniasis; but the fact is that they have other symptoms and these people, too, were healthy.

I'll give you an exact example. There was a gentleman in my district, Reuben Negrete, who was in the Navy for I think 12 years before he was sent over to the Gulf War. And he was not sea-going, but he was on land at one of the particular stations there and he developed some kind of a symptom. And he's not the only one; there's now been documented, a number of cases, and I forget the number, but it's been quite a number. In fact, such a number that they did a study out at Walter Reed which determined that all of these symptoms that these people were suffering were caused by stress; stress that incapacitated individuals to the point that they couldn't move their limbs, their muscles could not be used. This particular individual, Reuben Negrete, can't walk a block without

a cane and without getting completed exhausted and tired. Before he went there, there was nothing wrong with him.

The Navy made a great settlement with him on disability. He was healthy when he went in the Navy. He was healthy for the 12 years. He was healthy until he went to the Gulf War. He comes back and the Navy is going to give him a great deal. They're going to give him 10 percent disability. The guy can't lift his hand. He's got a family of wife and two children, and he's going to get 10 percent. Well, he balked and we balked, and he finally was given a grand total of 60 percent disability. Here's a guy that deserves 100 percent disability. For all the years that he was active duty, he gave to his country; gave, unselfishly. And now the country is being very selfish about the way it treats him.

Now, the Army has tried to deny that any of these symptoms that any of these people that suffer them incurred these ailments from the Gulf War. And isn't it funny that none of them had any of those symptoms before they served in the Persian Gulf War. The U.S. Government has not asked for us to do a study to determine exactly what happened to these people. Because, there is something there and we can't deny that.

There's another gentleman that a big article was written for, Bob, in one of our magazines. They described it as the guy before he was in the reserves and before he was called up, he had a very successful business. He has no business now because he can't run his own business. He lies in a bed unable to move and almost in a semicoma condition.

I don't understand now, when we negotiate all these things, that we don't take into consideration that in the first place, a crazy man and an idiot started the Persian Gulf War, and there are even some claims that he may have started it with what he believed were the good wishes of the United States, and that he felt we weren't going to do anything about it. Or, as I understand, the communique indicated that we were not that interested.

Mr. GILMAN. Will the gentleman yield?

Mr. MARTINEZ. Yes.

Mr. GILMAN. In addition to these kind of claims, one claim that we haven't heard about is the government, a U.S. Government claim for grain products that have been submitted. Do we have an estimate of what that claim will be?

Mr. MATHESON. Yes. Do you have the figures?

Mr. NEWCOMB. Yes. The estimate is approximately $2 billion.

Mr. GILMAN. $2 billion dollars. Is that going to preempt all of these other claims?

Mr. MATHESON. That won't preempt it. Under the legislation, the President would make an allocation of the available funds between the government and the private claims.

Mr. GILMAN. Is the U.S. Government willing to step aside and let the other claims be adjudicated before the U.S. claim is adjudicated?

Mr. MATHESON. I can't say that. I think the President would have to make a judgement. My guess is that it would be on the basis—on some kind of proportional basis to the fair amount of claims in the two pots.

Mr. GILMAN. Is that U.S. claim of $2 billion included in your estimate—initial estimate that you gave this committee?

Mr. MATHESON. Yes, it is. It constitutes approximately 40 to 50 percent of the estimate.

Mr. GILMAN. Forty to 50 percent of the total claims.

Mr. MATHESON. Yes.

Mr. GILMAN. Thank you and thank the gentleman for yielding.

Mr. MARTINEZ. Just to sum up, let me ask you this: in the priorities that you just said, do you have a list of the priorities that are set, and who is going to get adjudicated first, and what claims are going to be satisfied first, and et cetera? And along the lines that Mr. Gilman has asked, you know, the Federal Government, I think, since they asked these young people to get called up and really are not doing a heck of a lot to discover what it is that is ailing them and make right their cases, that maybe through this money that sits in that fund, they could have priority and get some of it.

Mr. MATHESON. The only priority——

Chairman HAMILTON. Before you respond, may I just excuse myself because I have a commitment at 11:30 that I have to meet. And I will ask Mr. Engel, if he would, to take the Chair. Excuse me for the interruption. The only other person is Mr. Rohrabacher. He is next. Mr. Bereuter has some additional questions, I believe. Mr. Engel, thank you, very much.

Mr. MATHESON. Could I just——

Mr. BURTON. Before you go, Mr. Chairman, can I ask one question? Are we going to be passing on this legislation today?

Chairman HAMILTON. No. We are scheduled to consider it tomorrow.

Mr. BURTON. Thank you.

Mr. MATHESON. The only priority included in the legislation is that the claims of individuals who suffered as a result of the Iraqi invasion occupation would have priority over other claims. So that if you had an individual who could demonstrate to the Foreign Claims Settlement Commission that he was injured because of his service in the war, then of course that would fall within that category. Obviously, I can't address the specifics of the cases you mentioned.

Mr. MARTINEZ. So each of these cases that I'm talking about, those people would still, where they haven't been able to prove to the Army that it was service-connected and Gulf-connected, would still have the difficulty of proving that it was Gulf-connected before they could be considered for a claim?

Mr. MATHESON. Yes. We have to have some kind of criteria and some kind of procedure for adjudicating whether a claim is valid.

Mr. MARTINEZ. Well, I understand that. What I'm saying is that this kind of leaves these people out because as far as I know, unless something over the last couple of months have changed, the report at the Walter Reed Army Hospital is still that these are stress related, and they're not stress related.

Mr. MATHESON. Well, let me put it this way: obviously, this bill doesn't specifically address the phenomenon you're talking about. But what it does, is it takes all of the Iraqi assets we've frozen here in this country, and makes it available to American claimants, and

gives a priority to individuals who suffered in the war. That's about all I can think of to do in this legislation, sir.

Mr. MARTINEZ. Tragically. Tragically. I know people that have been affected by this war that may not be covered because as you say, "of this legislation."

Well, I think when we write legislation, we have a responsibility to the people we represent and that is to make sure that when they have a legitimate claim, and I believe these people have a legitimate claim, that they're taking care of. I'm sorry. Thank you.

Mr. MATHESON. Then this would be a procedure for that if they have legitimate claims.

Mr. MARTINEZ. Thank you.

Mr. ENGEL [presiding]. Thank you. I've read your testimony and I believe I know the answer to this; but I want you to really underscore it. Obviously, the Senate, in their bill, the Secured Payment Act, and the whole issue of letters of credit, I want you to state for the record that the preferable course that the administration wants certainly is not in legislation passed in the Senate, which would make a letter—put a letter of—person holding a letter of credit, move them to the front of the line. I know that you said that in your testimony, but I just wanted to underscore it.

Mr. NEWCOMB. The current Treasury regulations follow established letter of credit law. We follow that procedure where goods were exported from the United States and were shipped, and due diligence was made to divert, stop or return those goods, and there was a confirmed letter of credit, meaning there was a legally binding commitment created in the trade finance arrangement on the part of the bank in the United States to make payment upon presentation of documents, we allowed the payment on those letters of credit as a completed transaction.

However, where there was a situation of advised letters of credit, we did not permit those payments, not wanting to change the terms of the business arrangement entered into and the fact there was no legally binding obligation on the part of the U.S. institution to make those payments.

Mr. ENGEL. Can you state for the record what the specific difference is between a confirmed letter of credit and an advisory letter of credit?

Mr. NEWCOMB. Basically, it's the fact that there's a legal obligation on the part of the institution to pay on the letter of credit when it's confirmed by an U.S. institution. That means the U.S. bank has undertaken an independent obligation to make payment on proper presentation of documents to the institution. The advised letter of credit, where a U.S. bank advises on a letter of credit issued or confirmed by a foreign bank; the U.S. bank has no such legal obligation to pay.

Mr. ENGEL. Can you explain why those with advisory letters of credit are part of the general pool of private claimants, while those with confirmed letters of credit already have been reimbursed in full?

Mr. NEWCOMB. Well, as I indicated, that we followed the standard letter of credit law, and these are unsecured creditors, creditors that have no direct legally binding claim on specific Iraqi Government assets in the United States.

Mr. ENGEL. So both types of letters of credit were not treated similarly in the Iraq claim settlement process?

Mr. NEWCOMB. We made an early decision. The decision was made by the previous administration very early on in the asset freeze, that where goods were shipped and there was a confirmed letter of credit, that we would permit payment under those letters of credit. Where, however, there was an advised letter of credit, such payment would not be permitted, a license would not be granted, as there was no legally binding obligation by the U.S. institution. Some may or may not have had the funds on deposit. The U.S. institution was acting in a role on behalf of the issuing bank to advise on the terms of the credit or advise on the terms of the financing arrangement.

Mr. ENGEL. OK. Under the Iran settlement issue, the claims were paid differently. Can you tell us why?

Mr. NEWCOMB. Well, let me say first, in Iran, there were considerably more assets: total blocked monies may have approached as much as $12 billion, both in U.S. banks, foreign branches of U.S. banks, tangible property, gold and securities. A decision was made that where there was an advised letter of credit, where there was hardship, up to amounts of $500,000, a discretionary decision was available to permit that payment. But, essentially, you have difference in magnitude, difference in size. And since that time, in Libya, Yugoslavia and Iraq, that provision has not been included in our regulations.

Mr. ENGEL. On the issue of pending litigation and the concern that some people have expressed about litigation that is already pending being at a disadvantage, hypothetical: say at the end of the day, a Federal court would have ruled that the U.S. Government must consider advisory letters of credit in the same category as confirmed letters of credit. This would mean that the executive branch would have to unblock those frozen assets that would cover the advisory letters, or otherwise, reimburse the holders of such letters. Is that not correct?

Mr. NEWCOMB. Well, in your hypothetical situation, if the Congress or a court were to say that the advised letter of credit now has some kind of a priority treatment, there should be afforded some kind of priority treatment, that would essentially change the terms of the contracting parties, people that purchased the trade financing arrangement had contracted for. As to whether or not we're going to be bound by the courts, clearly, we'll be bound by the courts.

Mr. MATHESON. Can I put this in somewhat more concrete terms, picking up the questions that have been asked earlier? Every dollar that would be directed by a U.S. court or by the Congress to be paid to the holders of these particular letters of credit would then not be available for distribution to claimants generally, including all of the individuals whom other Members have described as having suffered losses in the Persian Gulf case. It's a very simple question. Do you want to give priority to these holders of these particular kinds of letters of credit, or do you want to give priority to the Persian Gulf War veterans?

Mr. ENGEL. I think that's very well put. Thank you. Mr. Bereuter.

Mr. BEREUTER. Thank you, Mr. Chairman. I appreciate the line of your questioning there. I think you're getting down to some of the important definitions.

Let me briefly, before I ask a couple of questions, do a recapitulation of what I think we've heard. We have $1.2 to $1.3 billion in frozen Iraqi assets. We have first priority to go to a serviceman or their families who were injured or killed in Desert Shield or Desert Storm. Mr. Manzullo is estimating that will exceed the $1.2 billion. We have a government claim which cannot be paid out of the U.N. Commission—the U.S. Government claim, in other words, estimated at $2 billion. Plus, we have Mr. Martinez suggesting that there are—there should be an opportunity for people who have stress-damaged claims, servicemen who make claims on this same $1.2 or $1.3 billion. And we haven't even got to the commercial claims at this point. So, it's a rather slim likelihood, it seems to me, that there are any commercial claims that will be settled from this small pot of money.

Mr. MATHESON. May I try to explain that a little differently?

Mr. BEREUTER. All right.

Mr. MATHESON. The first thing that happens is the President takes the available money from the frozen assets and he allocates it between government and private claims. So the government will not recover 100 percent on its dollar either.

Mr. BEREUTER. Yes.

Mr. MATHESON. So, it's not a question subtracting 2 billion; but there will be some proportional allocation. With respect to the amount of the——

Mr. BEREUTER. You are telling me that, but there's no evidence or proof of that. There's nothing in the regulations that specifies the percentage. You're telling me this is a Presidential decision, aren't you?

Mr. MATHESON. I'm describing what I expect would be the decision; yes. With respect to the amount of money that is then reserved for private claims, there would a preference, and again, it only goes in terms of payment up to $100,000 per claimant. And when those amounts have been paid out, then all claimants share generally in the remaining proceeds. I don't think that means that there will be no money left for commercial claims. That isn't the way I would calculate it.

Mr. BEREUTER. Before I ask a question which related to whether there's any precedent for U.S. servicemen injured or killed in a conflict, or their dependents, their family to make claims against frozen assets or assets of the enemy, and I had a response, but it really went to the POW issue. And POW's are those type of servicemen's claims that can be paid under the U.N. funds. But, I still will wait for some indication that what we're doing here is not a precedent. I believe, based upon what I've heard here today, I have no evidence presented to me that we've ever done this before.

Let me go to this question: how much in claims—how many exporters with irrevocable letters of credit who actually shipped goods to Iraq do you expect that there are?

Mr. NEWCOMB. I don't have that exact figure because our criteria was laid out in our regulations as to how we were administering the program, the rules that we would follow, the fact that we would

grant licenses on confirmed letters of credit, and that we would not grant licenses——

Mr. BEREUTER. Do you have an estimate?

Mr. NEWCOMB [continuing]. If they didn't they have—yes, I do. I'm getting to that. But let me say, then we did our census, it was self selecting and so, we may not have an accurate number. Let me say, there were 111 license applications that we received for individuals that did not—for individuals and companies that did not qualify under the terms that we laid out. As to the number of those that had actually shipped goods, I would say that it is a percentage of that; the exact percentage I don't know.

Mr. BEREUTER. I have been told that it may be around 50 exporters. Do you have—so, therefore, I guess you wouldn't be able to give me an indication of the estimated dollar value of those claims.

Mr. NEWCOMB. I can tell you the 111 applications we received for letters of credit that were not confirmed, they had a value of about $285 million. I would say 50, just off the top of my head, may be a fair guess. If we have that information, I'll go back and look and see if we can get it. But, let me say, Congressman——

Mr. BEREUTER. I just wondered if some people—some understanding of the dimension of the claims that are out there, just in this one commercial category.

Mr. NEWCOMB. Yes, I understand. But, let me point out, of that $285 million, banks have claims for direct loans, for example, where they have corresponding deposits in their institutions that have not been permitted payment either. So, I mean, essentially, what you're saying and what this discussion is leading to, is the fact that we recognize that there are too many claimants chasing too few dollars, and it's a question of an equitable allocation of the available funds, or the greatest equity to the greatest numbers.

Mr. BEREUTER. Well, with respect to the equity issue, you've raised—lead me to the next question. It's my understanding that OFAC has issued licenses for U.S. banks to collect Iraqi assets frozen by executive order. Why is OFAC treating U.S. banks differently from U.S. exporters who shipped goods to Iraq under irrevocable letters of credit and also have valid legal claims against Iraqi assets? Why treat the banks differently than those types of commercial interests?

Mr. NEWCOMB. Congressman, I don't think we have. As I indicated in answer to other questions, that where there was a confirmed letter of credit, meaning there was an independent obligation of the U.S. bank to make payment for goods shipped, and export documents are presented, we permitted the bank to reimburse itself; but only in those situations. We have not permitted U.S. banks to pay themselves where they have made, on their own business decisions, direct loans to Iraq.

Mr. BEREUTER. What about the commercial enterprise that they were dealing with in that export transaction?

Mr. NEWCOMB. On a confirmed letter of credit?

Mr. BEREUTER. Yes.

Mr. NEWCOMB. Where—as I indicated, early on in the program, a decision was made—and it was not just an OFAC or Treasury decision; it was an administration decision coordinated fully with the State Department and the NSC—that where goods were on the

high seas, had been shipped, made reasonable due diligence to retrieve those goods or divert those goods from Iraq, and the U.S. institution had confirmed on the letter of credit—upon presentation of export documents, those letter of credit claims were licensed to be paid. That was the underlying contract, trade financing contract entered into by the exporter.

Mr. BEREUTER. I want to ask one final question and then make a comment, and I raised this issue with you yesterday in my office briefly. I think that what we're doing here and the way that these assets are disposed of really is going to create difficulties for U.S. exporters in the future. I can only ask these questions and I think they're rhetorical, but I—because you can't give me a clear answer, that's for certain; no one could.

I think we ought to consider what effect will the establishment of these priorities have on behavior of U.S. exporters in the future. I think the legislation will force them to spend additional financing costs under transactions to assure them of some reasonable prospect or payment of commercial claims in the event of war in the future. I think beyond that, this will impact upon our OPIC, Overseas Private Investment Corporation, costs. And one could only speculate that with this kind of treatment and with the fact that we apparently establish in a precedent where servicemen's claims are paid first, that this will have some impact upon exporters.

Mr. NEWCOMB. Congressman, I'm actually glad you asked that question because I think the position that the Treasury Department took in its regulations, and that we followed consistently in application of those regulations, is that we honored terms of the trade financing arrangement. We did not seek to change the terms. The exporters have a clear basis for following the program that we've set up and administered, recognizing that what they bargained for is what they got; knowing that in the future when they bargain for a confirmed letter of credit, they know they took that out at a U.S. institution on Pennsylvania Avenue or on Wall Street. All they have to do is go to Wall Street. Where they don't get a confirmed letter of credit, they may have to go somewhere else to get paid. So, there is with our program a reasonable certainty that in the future, they will know what to expect.

Mr. BEREUTER. One of the questions I want to examine is the definition you've used and the importance that you've attached to confirmed letters of credit versus letters of credit that do not involve U.S. financial institutions. I do not understand fully that division when it comes down to a choice of a U.S. exporter on what nationality of a bank that exporter chooses to use. And that's simply—I'm saying this, that I do not accept necessarily the conclusion that you've reached about the choice between a U.S. bank versus a non-U.S. bank in an export transaction. And I want to look at that issue myself to see if, in fact, the division that you're making and the conclusions from it are reasonable.

Mr. Chairman, I know that there are other questions that probably should be asked, but I think that this covers the major ones that I wanted to ask, at least here today. I would ask unanimous consent that I be allowed to submit for the record some materials submitted to me and to potentially raise additional questions within a reasonable period of time.

Mr. ENGEL. Without objection.

Mr. BEREUTER. Thank you.

Mr. ENGEL. Well, seeing no other questions and no other members, I want to thank you for coming here this morning to testify before our committee, and the hearing is now adjourned.

[Whereupon, at 11:47 a.m., the committee was adjourned.]

MARKUP OF H.R. 3221—IRAQ CLAIMS ACT OF 1993

WEDNESDAY, OCTOBER 14, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The Committee met, pursuant to call, at 9:14 a.m., in room 2172, Rayburn House Office Building, Hon. Lee H. Hamilton (chairman) presiding.

Chairman HAMILTON. The Committee will come to order and the first order of business will be the consideration of H. Con. Res. 158, which the chief of staff will report.

[Whereupon the committee proceeded to other business.]

The next order of business is consideration of H.R. 3221, which the Chief of Staff will report.

Mr. VAN DUSEN. H.R. 3221 provides for the adjudication of certain claims against the Government of Iraq. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Chairman HAMILTON. Without objection, further reading of the bill will be dispensed with, printed in the record in full and open for amendment.

[Text of H.R. 3221 follows:]

103D CONGRESS
1ST SESSION

H. R. 3221

To provide for the adjudication of certain claims against the Government of Iraq.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 6, 1993

Mr. HAMILTON introduced the following bill; which was referred to the Committee on Foreign Affairs

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A BILL

To provide for the adjudication of certain claims against the Government of Iraq.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Iraq Claims Act of 1993".

SEC. 2. ADJUDICATION OF CLAIMS.

(a) CERTAIN CLAIMS WITHIN THE JURISDICTION OF UN COMMISSION.—The United States Commission is authorized to receive and determine the validity and amounts of any claims referred to it by the Secretary of State with

respect to which the United States has received lump-sum payments from the United Nations Commission.

(b) Other Claims Against Iraq.—The United States Commission is authorized to receive and determine the validity and amounts of any claims by nationals of the United States against the Government of Iraq that are determined by the Secretary of State to be outside the jurisdiction of the United Nations Commission.

(c) Decision Rules.—In deciding claims under subsection (a) or (b), the United States Commission shall apply, in the following order—

(1) in the case of claims under subsection (a), relevant decisions of the United Nations Security Council and the United Nations Commission;

(2) applicable substantive law, including international law; and

(3) applicable principles of justice and equity.

(d) Priority Claims.—Before deciding any other claim against the Government of Iraq, the United States Commission shall, to the extent practical, decide all pending noncommercial claims of members of the United States Armed Forces and other individuals arising out of Iraq's invasion and occupation of Kuwait.

(e) Applicability of International Claims Settlement Act.—To the extent they are not inconsistent

with the provisions of this Act, the provisions of title I (other than section 2(c)) and title VII of the International Claims Settlement Act of 1949 (22 U.S.C. 1621–1627 and 1645–1645o) shall apply with respect to claims under this Act and the funds established pursuant to sections 3(a) and 3(c).

SEC. 3. CLAIMS FUNDS.

(a) UN COMMISSION CLAIMS FUNDS.—The Secretary of the Treasury is authorized to establish in the Treasury of the United States one or more funds (hereinafter in this Act referred to as the "UN Commission Claims Funds") for payment of claims under section 2(a). The Secretary of the Treasury shall cover into the UN Commission Claims Funds such amounts as are allocated to such funds pursuant to subsection (b)(1).

(b) ALLOCATION OF FUNDS RECEIVED FROM UN COMMISSION.—The Secretary of State shall allocate funds received by the United States from the United Nations Commission, in the manner the Secretary determines appropriate, between—

(1) the UN Commission Claims Funds; and

(2) funds established under the authority of the paragraphs under the heading "TRUST FUNDS" in the Act entitled "An Act making appropriations for the diplomatic and consular service for the fiscal

year ending June thirtieth, eighteen hundred and ninety-seven", approved February 26, 1896 (22 U.S.C. 2668a).

(c) IRAQ CLAIMS FUND.—The Secretary of the Treasury is authorized to establish in the Treasury of the United States a fund (hereinafter in this Act referred to as the "Iraq Claims Fund") for payment of claims under section 2(b). The Secretary of the Treasury shall cover into the Iraq Claims Fund such amounts as are allocated to such fund pursuant to subsection (d).

(d) ALLOCATION OF PROCEEDS FROM IRAQI ASSET LIQUIDATATION.—The President shall allocate funds resulting from the liquidation of assets pursuant to section 4 in the manner the President determines appropriate between the Iraq Claims Fund and such other accounts as are appropriate for the payment of claims of the United States Government.

SEC. 4. AUTHORITY TO VEST IRAQI ASSETS.

The President is authorized to vest and liquidate as much of the assets of the Government of Iraq in the United States that have been blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) as may be necessary to satisfy claims under section 2(b), as well as claims of the United States Government against Iraq which are determined by the

Secretary of State to be outside the jurisdiction of the United Nations Commission.

SEC. 5. PROGRAM ADMINISTRATION SELF-SUFFICIENCY.

(a) DEDUCTIONS FOR ADMINISTRATIVE EXPENSES.—In order to reimburse Executive agencies for their expenses in administering the Iraq claims program and this Act, the Secretary of the Treasury shall deduct an amount equal to 1½ percent—

(1) from any amount covered into the claims funds established under section 3(a) or 3(c); and

(2) from any amounts the Secretary of State receives from the United Nations Commission which are not covered into a claims fund established under section 3(a) and which are not in payment of a claim of the United States Government.

(b) DISTRIBUTION.—The Secretary of the Treasury—

(1) shall determine, in consultation with the Chairman of the United States Commission and the Secretary of State, the proportional distribution of the reimbursement set-aside provided for in subsection (a); and

(2) shall make an advance for credit, or reimburse, an Executive agency for its expenses in administering the Iraq claims program and this Act.

Amounts received by an Executive agency pursuant to paragraph (2) shall be credited or reimbursed to the appropriation account then current and shall remain available for expenditure without fiscal year limitation.

SEC. 6. PAYMENTS.

(a) IN GENERAL.—The United States Commission shall certify to the Secretary of the Treasury each award made pursuant to section 2. The Secretary of the Treasury shall make payment, out of the appropriate fund established pursuant to section 3(a) or 3(c), in the following order of priority to the extent funds are available in such fund:

(1) Payment of $10,000 or the principal amount of the award, whichever is less.

(2) For each claim that has priority under section 2(d), payment of a further $90,000 toward the unpaid balance of the principal amount of the award.

(3) Payments from time to time in ratable proportions on account of the unpaid balance of the principal amounts of all awards according to the proportions which the unpaid balance of such awards bear to the total amount in the appropriate claims fund that is available for distribution at the time such payments are made.

(4) After payment has been made of the principal amounts of all such awards, pro rata payments on account of accrued interest on such awards as bear interest.

(5) After payment has been made in full of all the awards payable out of a fund established pursuant to section 3(a) or 3(c), any funds remaining in that fund shall be transferred to the other claims fund created pursuant to section 3(a) or 3(c), except that any funds received by the United States from the United Nations Commission shall be so transferred only to the extent not inconsistent with requirements of the United Nations Commission.

(b) UNSATISFIED CLAIMS.—Payment of any award made pursuant to this Act shall not extinguish any unsatisfied claim, or be construed to have divested any claimant, or the United States on his or her behalf, of any rights against the Government of Iraq with respect to any unsatisfied claim.

SEC. 7. RECORDS.

(a) TRANSFER TO COMMISSION.—The head of any Executive agency may transfer or otherwise make available to the United States Commission such records and documents relating to claims authorized to be adjudicated

by this Act as may be required by the United States Commission in carrying out its functions under this Act.

(b) PUBLIC DISCLOSURE.—Section 552 of title 5 of the United States Code (commonly referred to as the "Freedom of Information Act") shall not apply with respect to records that, as determined by the Secretary of State, are required under the rules and decisions of the United Nations Commission to be withheld from public disclosure.

SEC. 8. STATUTE OF LIMITATIONS; DISPOSITION OF UNPAID CERTIFIED CLAIMS.

(a) STATUTE OF LIMITATIONS.—Any demand or claim for payment on account of an award that is certified under the Iraq claims program shall be barred one year after the publication date of the notice required by subsection (b).

(b) PUBLICATION OF NOTICE.—Nine years after the latter of—

(1) the last date on which the Secretary of the Treasury covers into any of the UN Commission Claims Funds, or into any fund described in section 3(b)(2), amounts allocated to that fund pursuant to section 3(b), or

(2) the last date on which the Secretary of the Treasury covers into the Iraq Claims Fund amounts allocated to that fund pursuant to section 3(d),

the Secretary shall publish a notice in the Federal Register detailing the statute of limitations provided for in subsection (a) and identifying the claim numbers and awardee names of unpaid certified claims.

(c) DISPOSITION OF UNPAID CERTIFIED CLAIMS.—Two years after the publication date of the notice required by subsection (b), any unpaid certified claim amount under the Iraq claims program, and any remaining balance in any of the UN Commission Claims Funds, in the Iraq Claims Fund, or in any fund referred to in section 3(b)(2) to the extent such balance reflects amounts deposited pursuant to that section, shall be deposited to the miscellaneous receipts of the Treasury.

SEC. 9. DEFINITIONS.

As used in this Act—

(1) the term "Government of Iraq" includes agencies, instrumentalities, and controlled entities (including public sector enterprises) of that government;

(2) the term "Executive agency" has the meaning given that term by section 105 of title 5, United States Code;

(3) the term "Iraq claims program" means the claims whose adjudication is provided for in this Act and any other claims that are within the jurisdiction of the United Nations Commission;

(4) the term "United Nations Commission" means the United Nations Compensation Commission established pursuant to United Nations Security Council Resolution 687 (1991); and

(5) the term "United States Commission" means the Foreign Claims Settlement Commission of the United States.

Mr. GILMAN. Mr. Chairman——

OPENING STATEMENT OF HON. LEE H. HAMILTON

Chairman HAMILTON. Will the gentleman hold just a moment, please. The Chair wants to note that H.R. 3221 contains one technical change from the draft bill, marked up by the Economic Policy, Trade and Environment Subcommittee last week. The change results from a drafting error in narrowing the original administration provision on disclosure of records. Counsel inadvertently drafted the provision too narrowly to allow the administration to comply with U.N. rules and procedures. The bill before you corrects that error.

This bill provides the necessary authority to establish, maintain, and ultimately terminate a fair and orderly system for adjudicating the claims of U.S. nationals against Iraq. In other claims situations, the U.S. Government has not started the claims settlement process until it has reached a government-to-government settlement. With Iraq, there is no reasonable prospect of reaching such a settlement, and for that reason, the United States needs the authority this bill provides to vest and then use the proceeds from frozen Iraqi assets in the United States to provide awards to U.S. claimants.

We ought to be clear on one point: it is not at all likely that everyone with claims against Iraq will be reimbursed in full for their loss. In fact, it is likely that no one will be reimbursed in full; there is simply not enough money to go around. It is estimated that there will be approximately $4 to $5 billion in individual and government claims. There's approximately $1.2 billion in frozen Iraqi assets in this country. So, we have to ensure a process that is as fair and equitable for settling outstanding claims as we can make it.

The bill is directed toward two goals: it sets up a system for dealing with the claims of U.S. nationals that predate the Gulf War, and it sets up a structure for handling funds that the United States may receive from the U.N. Commission. The U.N. is handling claims that result from Iraq's invasion and occupation of Kuwait. The bill authorizes the U.S. Foreign Claims Settlement Commission to administer and, if necessary, to allocate funds received from the U.N. Commission. The U.N. Commission plans to use Iraqi oil exports to provide compensation to foreign governments, individuals and corporations that have suffered direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait.

The U.N. Commission's mandate includes providing compensation to prisoners of war who have suffered losses or injuries due to treatment that violated international humanitarian law. The U.N. Commission will not hear claims of U.S. servicemen who may have suffered losses in the course of their duty during the Iraq war, however. For this reason, these servicemen are given special priority under the U.S. Commission procedures.

Mr. Gilman will offer an amendment, with my support, to include all noncommercial claims of individuals arising from the 1987 attack on the U.S.S. *Stark* in that special priority category. The bill authorizes the U.S. Commission to pay claims that are not within the jurisdiction of the United Nations Compensation Commission.

In other words, the U.S. Commission will handle other losses suffered by U.S. claimants, such as prewar debts and obligations, injury claims of seamen on the U.S.S. *Stark*, and death and injury claims of operation Desert Storm veterans.

The U.N. Commission is up and running. Filing deadlines for claimants with the U.N. Commission have been set. The U.S. needs a structure in place to accommodate the U.N. process. Since we will not be able to reach settlement with Iraq, claimants deserve to have their claims heard while the evidence of their losses is still fresh. There are efforts to take one group of claimants, those with advised letters of credit, out of the U.S. Commission process and pay them in full and ahead of all other individual and corporate claims. In the view of the Chair, it is not for Congress to decide on a case-by-case basis which companies or individuals should receive what percentage payment on their loss. That's precisely the task of the U.S. Foreign Claims Settlement Commission.

I believe we should approve this legislation so that we can allow the U.S. Commission to do its job and so we can get this claims settlement process moving. Is there further discussion or amendment? Mr. Gilman.

OPENING STATEMENT OF HON. BENJAMIN A. GILMAN

Mr. GILMAN. Mr. Chairman, a number of important questions were raised at yesterday's hearing concerning the extent of the claims on Iraqi assets and the priority we should assign to those claims. After today's markup, I would hope that our Committee would remain flexible in our approach to this legislation. We are going to have to make certain that Iraq remains fully liable for the damages associated with their invasion of Kuwait, and that nothing that we do in this legislation takes away from the rights of the numerous claimants to compensation from the Claims Commission or from Iraq in its future stream of oil revenues.

And, Mr. Chairman, I'm pleased to join with you in cosponsoring the important amendment with regard to the 67 sailors that were injured in the brutal and unprovoked attack by Iraqi aircraft on the U.S.S. *Stark* on May 17, 1987. It certainly will ensure that these Navy personnel and their families are given no less priority than all the pending noncommercial claims of the members of the armed forces arising out of the Iraqi invasion, the occupation of Kuwait. And while the Iraqi Government did provide compensation to our Government for the wrongful death payments to the sailors on the U.S.S. *Stark* killed in this attack, no agreement was reached with the Iraqis on the compensation of those wounded prior to the Iraqi invasion of Kuwait in 1990.

Accordingly, adoption of our amendment will not mean that the U.S. Government is giving up in its efforts to ensure that Iraq provide us full compensation for those injuries, those brave men that were involved. It does ensure, however, that these men can receive some compensation shortly after the legislation is enacted. So, I would encourage my colleagues to join with us in that effort.

HAMILTON/GILMAN AMENDMENT

Chairman HAMILTON. The gentleman's offering an amendment at this time. The Chief of Staff will record the amendment.

Mr. VAN DUSEN. Amendment offered by Mr. Gilman and Mr. Hamilton——

Chairman HAMILTON. Without objection, further reading of the amendment is dispensed with, printed in the record in full and open for amendment.

[The amendment follows:]

AMENDMENT OFFERED BY MR. HAMILTON/GILMAN

Page 2, line 23, before the period, insert "or out of the 1987 attack on the USS Stark".

Chairman HAMILTON. I think the Committee has heard the description given by Mr. Gilman. Do you have any further comments, Mr. Gilman?

Mr. GILMAN. No, no further comments and I move the amendment.

Chairman HAMILTON. Mr. Lantos.

Mr. LANTOS. Mr. Chairman, I want to commend you and Mr. Gilman for offering this amendment. But, I would like to state for the record that had this issue not been raised by my distinguished colleague from Nebraska, Mr. Bereuter, and myself yesterday, it would not now be in this bill. And I want the administration to note for future reference that sloppily, sloppily prepared measures will get very careful scrutiny by this committee. I find it unthinkable and unconscionable that the victims of the Iraqi attack on the U.S.S. *Stark* would not have been included in the legislation submitted by the administration.

And when this was called to their attention, the administration spokesman indicated that he has no objection to having these individuals included. And it was only under serious questioning that the administration admitted a mistake and an oversight. I think the administration should be the first one to propose that survivors of that tragedy be compensated from Iraqi assets, rather than just not having any objections to such a procedure.

This undermines the confidence of some members of the committee in the competence of some members of the administration in presenting to this committee serious pieces of legislation. This was not a policy issue. This was an oversight, but a very serious oversight which we hope will not occur in the future. Thank you, Mr. Chairman.

Mr. GILMAN. Mr. Chairman, I move the amendment.

Chairman HAMILTON. The Chair wants to express appreciation to Mr. Lantos and Mr. Bereuter for pointing that out, and for Mr. Gilman in sponsoring the amendment. Is there further discussion?

VOTE ON HAMILTON/GILMAN AMENDMENT

If not, the question is on the adoption of the amendment. All in favor, signify by saying aye.

Those opposed, no.

The ayes have it and the amendment is adopted.

Mr. MARTINEZ. Mr. Chairman.

Chairman HAMILTON. Mr. Martinez. I recognized a Republican for the amendment; I'll recognize a Democrat now.

Mr. MARTINEZ. Mr. Chairman, I really don't have an amendment. I would have liked to offer an amendment that would have—say for

the giving of priority. And I understand that priorities are important, but I would have given the priority for all of the money that we have seized in assets from Iraq, the $1.2 billion for those people that were afflicted or affected by the Gulf War in whatever way.

And let me tell you why I'm concerned. I'm concerned that certain Persian Gulf veterans who have been afflicted by debilitating health problems since their return from operation Desert Storm will be denied compensation under the Iraq Claims Act of 1993. And I am troubled by the fact that we do not know the standards by which the U.S. Foreign Claims Settlement Commission is going to review veteran claims. If our own government refuses to recognize service-connected health problems of Persian Gulf veterans because their medical conditions defy diagnosis, then how can we expect the U.S. Commission to act any differently.

If the Agent Orange debacle has taught us anything, it should be that we are duty bound to give our veterans the benefit of the doubt. It took Vietnam veterans nearly 17 years to have their Agent Orange claims recognized by the U.S. Government. Persian Gulf veterans should not have to suffer through that same ordeal. Our men and women in operation Desert Storm were exposed to environmental hazards that have yet to be fully understood.

For example, my constituent, Reuben Negrete, was part of a construction battalion in Bahrain where he was exposed to large quantities of oil smoke, generator exhaust fumes, microwave radiation and all types of chemical agents. During a 14-year career in the Navy, Reuben Negrete was in perfect physical health. It was only after his service in the Persian Gulf that Reuben began to suffer the loss of memory, hair loss, chronic fatigue, severe arthritis. In fact, Reuben's ailments are so severe that he has great difficulty walking even a street block and suffers constant muscle and joint pain throughout his body. In the words of Reuben Negrete's mother, who has painfully watched the physical deterioration of her 33-year-old son, Reuben has become a shadow of his former self. Those are haunting words for Reuben's son, wife and parents, who must live through the devastating consequences of the Persian Gulf.

Mr. Chairman, for the sake of Persian Gulf veterans like Reuben Negrete, I believe that it is incumbent upon this committee to address this issue in the committee's report language. I would hope that we would include language in the committee report that urges the U.S. Commission to give Persian Gulf veterans the benefit of the doubt in resolving their claims against Iraq.

Mr. Chairman, my own preference, like I said in the beginning of my statement, for that $1.2 billion is to reserve all of that money for the people, the veterans and the civilians that were affected directly by the Persian Gulf, including those of the U.S.S. *Stark*, and all commercial claims be referred to the fund that is coming from the 30 percent assessment on the Iraq oil sales. I would think that would be a more equitable way to handle it. And maybe by the time this comes to the floor, if somebody else hasn't offered that amendment, I will offer that amendment on the floor and I reserve my right to do so. Thank you, Mr. Chairman.

Chairman HAMILTON. Thank you, Mr. Martinez. You, of course, make a good point and we will certainly accommodate you with regard to the report language as you've suggested.

Mr. Bereuter.

MOTION OFFERED BY MR. BEREUTER

Mr. BEREUTER. Thank you. Mr. Chairman, I have a motion at the desk.

Chairman HAMILTON. The clerk will report the motion. The clerk does not have it?

Mr. BEREUTER. I sent it down there just a minute ago.

Chairman HAMILTON. Bring it up here and we'll read the motion. The Chief of Staff will report the motion.

Mr. VAN DUSEN. Mr. Bereuter's motion: "I move to recommit the bill H.R. 3221 to the Subcommittee on Europe and the Middle East with instructions to hold further hearings and report back legislation to the committee with recommendations no earlier than 2 weeks from this date."

Chairman HAMILTON. The gentleman is recognized and in support of his motion.

Mr. BEREUTER. Thank you, Mr. Chairman, members of the committee. You've heard the motion. I have recommended that—as a part of this motion, I have included the phrase, "with recommendations no earlier than 2 weeks from this date." I hope this would demonstrate my goodwill and good intentions that legislation should be enacted by the Congress ultimately and in a timely fashion.

I want this committee to do its job on this legislation. This legislation is controversial. It's been scarcely considered because I think it's only recently that we've begun to understand some of the points of contention within it. The fund is estimated to contain about $1.2 to $1.3 billion. These are the Iraqi frozen assets that have not been otherwise disposed. The gentleman from Illinois, Mr. Manzullo, based on his experience was suggesting that the military personnel and other noncombatants that are given priority by this legislation would have claims that perhaps would exhaust this alone.

In addition, we learned in the course of the hearing yesterday for the first time that the U.S. Government claims, themselves, primarily CCC loans, since Iraq began nonpayment of CCC loans only at the outbreak of hostilities, those claims may amount to $1.9 billion. Beyond that, there are at least 111 claimants. I believe that not only are parts of this legislation appropriately subject to scrutiny consideration through further hearings, possibly amended by legislation, but I also believe that the Office of Foreign Asset Control is making some decisions about commercial claimants that at least deserve to be discussed and that could be a part of the deliberation. Maybe the legislation should, itself, address those decisions that are being made under existing authority by the Office of Foreign Asset Control.

In any case, Mr. Chairman, I believe regardless of the disposition of this motion, that this legislation should not come to the House floor under suspension. It has been provided, as a result of the hearings being completed only yesterday, inadequate time to draft amendment. Mr. Martinez was suggesting he may like to reserve the right for report language; or as I understand it, amendment. And while I hope that we can go back and do this properly by referral to a subcommittee, and I'm referring it to the Europe and Mid-

dle East Subcommittee by this motion, and not to the originating subcommittee because they did hold a short set of hearings on the subject, that this motion might have your favorable consideration. Thank you, Mr. Chairman.

Chairman HAMILTON. Mr. Lantos.

Mr. LANTOS. Mr. Chairman, I would like to support the motion of the gentleman from Nebraska.

I believe this item is one of great importance. I see no urgency in dealing with it. The 2-week time period proposed by Congressman Bereuter is reasonable. I think it is appropriate that it be given full consideration and I urge my colleagues to support Mr. Bereuter's motion.

Chairman HAMILTON. Any further discussion?

Mr. MANZULLO. Mr. Chairman.

Chairman HAMILTON. Mr. Manzullo.

Mr. MANZULLO. I would speak in behalf of Mr. Bereuter's motion. I think it's appropriate. We worked very closely with the Department of State, who gave us about a half an hour ago some documents. I'm sure they worked through the night to make those available to us this morning. There are a lot of questions. But there is a joint spirit here among all the Members to do the correct thing and we're headed in the right direction.

But, I would like to have these hearings held because of one of the things that we have discovered in conversations with Congressman Steve Buyer of Indiana, who is a Gulf War vet, concerning a considerable number of Gulf War vets who are suffering maladies as a result of being in the war. And the purpose of the 2-week delay would not be to discuss the validity of these claims, but to show that there are amendments, such as the one that I will work with the committee to enlarge the U.N. Commission to encompass claims of soldiers who were injured. But who were not POW's who suffered Geneva rights mistreatment; and also to ask the Government of Kuwait to consider kicking in monies to reimburse these American soldiers.

So, Mr. Bereuter's request, I think, is reasonable. It will give us time to address the commercial claims and the personnel injury claims. And I would suggest that the members of the Foreign Affairs Committee here today agree to that request.

Mr. SMITH. Mr. Chairman.

Chairman HAMILTON. I didn't hear who it was. Mr. Smith.

Mr. SMITH. Thank you, very much, Mr. Chairman. I want to associate myself with the remarks of Mr. Martinez. I serve as Ranking Member on the Hospitals and Health Care Subcommittee, a Veterans Affairs Committee, and for 13 years went through that very difficult process of trying to justly compensate our Agent Orange veterans. And only recently did the proper presumptive disability compensation get awarded after the National Academy of Sciences finally determined what many of us believed to be the case, that many of the anomalies associated with Agent Orange were directly attributable to it.

Now, we have a situation where a number of environmental factors in the Persian Gulf War have adversely afflicted our servicemen and servicewomen. This Congress has moved our committee and the House has moved on H.R. 2535 in early August to provide

a presumptive priority care in our health care situation among the hospitals and outpatient clinics. But, we do not provide compensation. So, I think Mr. Martinez makes an excellent point that this is something that ought not to be left off the table, because many of our men are suffering: environmental hazards, inhalation of smoke, particularly when those well fires were burning out of control, and a host of other diseases and problems. So, I think Mr. Bereuter has an excellent point and I thank Mr. Martinez for bringing that up.

Mr. HASTINGS. Mr. Chairman.

Chairman HAMILTON. Mr. Hastings.

Mr. HASTINGS. Thank you, Mr. Chairman. I would like to support Mr. Bereuter's motion, as well. Mr. Chairman, as you know and the members who were present yesterday in the hearing, I raised a few questions. They were not major questions and I think they were resolvable. But, I would, in light of the fact that an opportunity may be presented to further inquire about them, I believe it appropriate and reasonable that we undertake this all too brief delay so that we can be more meticulous.

I would add, Mr. Chairman, that I believe not only that the spirit, but the commitment of the administration with reference to this matter is not being questioned. It is the membership that needs more time to participate with them. I thank you, Mr. Chairman.

Chairman HAMILTON. Any further discussion?

Mr. GEJDENSON. Mr. Chairman.

Chairman HAMILTON. Mr. Gejdenson.

Mr. GEJDENSON. Well, it just seems to me that the longer we delay, the longer the victims get no benefit, the more likely that a handful of large corporations with large legal staffs will get the lion's share of the benefit. And I guess the fundamental question comes down to whether Congress is here to provide protection for the broader segment of society, or are we here to try to set up a system that will allow a handful of very large corporations to walk away with the lion's share of the money, leaving next to nothing for those who were injured, those who fought in the war on our side, and some smaller individuals who will be truly devastated by this delay.

I mean, the question is very simple: do you think we ought to stop the process so a handful of large companies can get most of the money? They may have very legitimate claims, but they will survive without this legislation very nicely.

Mr. WYNN. Would the gentleman yield?

Mr. GEJDENSON. Yes, I'd be happy to yield.

Mr. WYNN. Thank you. I just wanted a clarification—sorry to startle you. I just wanted a clarification. It was my assumption that the bill contained a priority structure under which individuals, including members of the military, would have first priority. Is that not the case?

Mr. GEJDENSON. That's correct. And without this bill, unless they were able to retain legal counsel and get in line with all the large corporations, they'd be left behind.

Mr. WYNN. Is it basically your position, then, that the assets are going to be disposed of in the absence of our passing this bill immediately?

Mr. GEJDENSON. I think there's no question that there's a far greater likelihood that large corporations will walk away with the bulk of the assets, leaving nothing for people in the military.

Mr. WYNN. Under what authority would they be acting? What would be the——

Mr. GEJDENSON. They'd just take normal judicial action of filing their claims, and various courts would hear their claims and individually divvy up whatever is available.

Mr. WYNN. Would it be up to Federal legislation? Even if they'd initiated claims, could we not preempt any adjudication based on a priority system that we would set up?

Mr. GEJDENSON. Well, it would get much more difficult, it seems to me, once the courts divvied up the money to then step forward, go after each of the individual companies, get the money back from those companies, put it back into a kitty and try to do it all over again. The money is in one place now. It hasn't been divided up. We ought to protect the people we've been sent here to protect.

Chairman HAMILTON. If we could have the administration respond to the questions raised by Mr. Wynn. Is there someone that could do that? Identify yourself, please.

STATEMENT OF RONALD BETTAUER, ASSISTANT LEGAL ADVISER FOR CLAIMS, DEPARTMENT OF STATE

Mr. BETTAUER. I'm Ronald Bettauer, the Assistant Legal Adviser for Claims at the State Department. The question was?

Mr. WYNN. Well, basically, I associate myself with the comments of Mr. Martinez. With regard to the concern for individual members of the military and civilians who were adversely affected, if a 2-week delay would facilitate their getting a share of the assets, then I would support that. If a 2-week delay would hinder, as has been suggested by Mr. Gejdenson, their getting fair compensation, then I would probably not support it. So, I need to get some clarification as to how can we best protect the rights of the individual servicemen and civilians.

Mr. MARTINEZ. Would the gentleman yield so I can expand on that question you asked?

Mr. WYNN. Certainly.

Mr. MARTINEZ. In the first place, I don't see anybody rushing to expend all of the funds. Those funds are going to come from Iraqi oil sales, 30 percent of which will be garnished by the U.N.

Mr. GEJDENSON. Gentleman, you're claiming my time.

Mr. MARTINEZ. And the $1.2 billion——

Mr. GEJDENSON. You're claiming my time.

Mr. MARTINEZ. Would you excuse me. I'm asking a question.

Chairman HAMILTON. Mr. Gejdenson has the time.

Mr. GEJDENSON. Let me clarify that point, those are two separate funds. We're not affecting the U.N. fund. This fund is the frozen assets in this country.

Mr. MARTINEZ. If you'll allow me to finish asking my question you'll too learn that I know exactly what the funds are.

Mr. GEJDENSON. I'll be happy to yield back to my friend from California.

Mr. MARTINEZ. The $1.2 billion are the assets that are frozen. Is there a deadline in which this money has to be distributed? Is

there a court actually processing claims now and is going to act imminently before the 2 weeks on any of those claims to award any monies?

Mr. BETTAUER. Mr. Chairman, I'm not aware of specific court deadlines. But, there are court actions underway and delay, I think, works against the individuals; and acting expeditiously works for the individuals. The sooner that we put in place this legislation, the sooner that we can start the process of adjudicating their claims and seeing what the appropriate distribution is to them of the monies that are now blocked.

Mr. MARTINEZ. Spoken like a true Democrat, but that didn't answer my question. My question was: do you know of any deadline by which an award is going to be made? Is there, within 2 weeks, you know for a fact that some judge is somewhere going to say this claim is awarded?

Mr. BETTAUER. Congressman, I started my response by saying I was not aware of a specific date, but the court actions were underway now and that, therefore, it was better for individuals that we move as expeditiously as possible.

Mr. GEJDENSON. Reclaiming my time. The Consack case is an example of court action that has already occurred, especially for the gentleman from California. Consack—the case of Consack court action has occurred. We're now down to the appeal process. If tomorrow another court action begins and is dealt with in some expeditious fashion, a week or two down the road, we could be dealing with a second appeal process. There's no gain in waiting in this process.

Mr. MARTINEZ. If the gentleman would yield.

Mr. GEJDENSON. I'd be happy to yield.

Mr. MARTINEZ. Before, you know, he knows, as well as anyone else does, that between the time a court takes action and makes a decision, there's a whole system of processing by which any claim is paid. And I doubt that within 2 weeks that any claim is going to be paid. And if this Committee would take back this legislation and readjust the priorities, which I believe were made with a bureaucratic mentality; that those priorities were there with the compassion for the people; that we disturbed their lives and sent them to the Gulf War, out of civilian life in some cases, out of the military in other cases; where those people who had military careers will have now ended because of the Gulf War; and those reservists who were called up who had businesses, who have lost their businesses because of the war. And those priorities were set as a priority of all of the expenditure, out of the $1.2 billion fund. I think that would cease and desist any court action that was taken.

DEBATE ON BEREUTER MOTION

Chairman HAMILTON. Let the Chair just intervene here, if he may. We have a motion pending by Mr. Bereuter of Nebraska. That motion is to recommit the bill to the subcommittee for further consideration. And the motion also has in it a provision that recommendation should be reported back to the full committee in 2-weeks time from this date. The Chair really doesn't know how the votes fall on this particular motion, but it's very obvious that the

committee is quite narrowly evenly split on it. Under that circumstance, I don't think it's advisable to push the bill forward.

I personally think it's very important for us to move ahead on this legislation for the reasons that have been stated very well by Mr. Gejdenson and others. We do have here a situation, the race to the assets. Lawyers are very familiar with that and there are big bucks involved here. These claims cases are never easy. The Czech Claim case, some of the other claims cases we've had have been very difficult. And it is our obligation, I think, to try to put into place as quickly as we can a procedure that most people, at least, perceive to be fair.

Members should be aware that a lot of things are happening outside this committee room with respect to those assets. There are court cases going forward; there's a State Department authorization bill moving; and there is very aggressive action on the part of very large claimants to get at these assets. And I think it is important that this bill come up promptly.

Having said that, I also think that there is a lot of things to be discussed here, as Mr. Bereuter and others have mentioned. And it is the Chair's judgement, although he wants to move the bill forward as quickly as possible, that we should accept Mr. Bereuter's motion; try to work out some of these problems.

Now there's another factor here, and the factor is the situation on the floor. Mr. Bereuter said he did not want this bill to come out under suspension. I can appreciate that. The fact of the matter is with the calendar as it is today, we can't get this bill on the floor, unless it comes out under suspension in all likelihood—at least that's my impression. And, therefore, I think it's very important, very important that we try to work out these differences if we can, and I think we probably can in the Committee.

With that in mind then, it's the Chair's thought that we accept the Bereuter motion. And the Chair will instruct the staff to work with Mr. Bereuter and others on both the majority and the minority side to see if we can work through some of the problems here as quickly as possible and bring the bill back up before the committee for consideration.

Mr. BEREUTER. Mr. Chairman.

Chairman HAMILTON. Mr. Bereuter.

Mr. BEREUTER. Thank you, very much, Mr. Chairman. I sincerely appreciate your attitude and your counsel on this matter. I do think it is possible that we could work out the differences so that it could move to suspension calendar, and we would actually expedite the legislation. And my motion actually does read no earlier than 2 weeks from this date, because I did not want to mandate a particular date that the chairman would have to meet. But if he chooses to bring it up 2 weeks from today, I certainly have no objection.

Chairman HAMILTON. Yes, I will see how the discussions go on that. You're right, it does say no earlier than 2 weeks. Mr. Gejdenson.

Mr. GEJDENSON. I just say that—particularly for my friend from California, who I know shares my basic values on this issue—that we're not about to delay this 2 weeks, which will bring us to the end of October. With an adjournment date that will be somewhere

in the range of November 22, it is now very highly probable that we'll not deal with this legislation until we come back in the end of January, beginning of February. And I just like to say to all my colleagues on this Committee that I think we do have an obligation to protect the individuals over the large corporations. And I certainly hope that we can move this forward expeditiously, and not come back here in early winter with stalls in the Senate by Senate filibusters to find out that the men and women who we were trying to protect have lost their assets to court actions and delays in the Congress.

Chairman HAMILTON. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. I appreciate your statesman-like effort to allow all of the parties to be fully heard with regard to this very significant measure. And I would urge our administration people who are here, and we welcome their input, to work with those of us on the committee who do have some concern to try to work out an appropriate remedy that will be acceptable to the Congress. Thank you, Mr. Chairman.

Mr. MARTINEZ. Mr. Chairman.

Chairman HAMILTON. Mr. Martinez.

Mr. MARTINEZ. I would have hoped that my colleague, Mr. Gejdenson, wouldn't have left because his remarks that he referred to me seemed to be indicating that I'm not as much interested in the individuals than I am in the corporations, or the corporation would somehow win out. Let me underscore something, that the Federal Government controls that money. Those assets were seized by the Federal Government, and it will be the Federal Government and the Congress to decide what the priorities will be, not the bureaucracy.

Mr. Bereuter has already suggested that he has no desire to delay this any longer than absolutely necessary. And he has also expressed a willingness to work with all parties concerned to be able to bring it back within that amount of time. And that 2-week delay is not such an amount of time that would cause what Mr. Gejdenson imagines will happen, that all the corporations will walk off with the money. I'm hoping that out of these negotiations comes a determination that the $1.2 billion be reserved for those claims from those service-connected injuries through the Gulf War and from the U.S.S. *Stark*. And that the claims—commercial claims and other claims—prewar claims come out of the 30 percent assessment of the Iraqi oil.

VOTE ON BEREUTER MOTION

Chairman HAMILTON. Question occurs on the motion. All in favor say aye.

Those opposed, no.

The ayes have it. The bill is recommitted.

Chairman HAMILTON. The Committee stands adjourned with the chairman's expression of appreciation to Members for their participation.

[Whereupon, at 10:53 a.m., the committee was adjourned.]

H.R. 3221—IRAQ CLAIMS ACT OF 1993

WEDNESDAY, OCTOBER 20, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON EUROPE AND THE MIDDLE EAST,
Washington, DC.

The committee met, pursuant to call, at 10:40 a.m. in room 2172, Rayburn House Office Building, Hon. Lee H. Hamilton (chairman) presiding.

OPENING STATEMENT OF HON. LEE H. HAMILTON

Chairman HAMILTON. The hearing will please come to order.

I want to welcome our witnesses this morning. Tom Block is from the Bankers' Association For Foreign Trade; James Byrne, a Professor at the George Mason University School of Law; Anthony Lewis, President of the Klein-Berger Company; and James Magill, Director, National Legislative Service, Veterans of Foreign Wars of the United States.

We call these witnesses to discuss their views on the administration's request for legislation to adjudicate the claims of U.S. nationals against Iraq.

It is my understanding that Mr. Block is here to represent the views of U.S. banks, Mr. Byrne is here to offer an academic perspective on letters of credit law, Mr. Lewis is here to discuss the situation of his company, and Mr. Magill is here to speak for service personnel who may submit claims under this legislation.

I have introduced this bill in slightly redrafted form as H.R. 3221, the Iraq Claims Act of 1993. The committee has a lot of questions about it.

I appreciate the participation and interest of Mr. Lantos and Mr. Bereuter, Mr. Manzullo, and others in this bill.

We look forward to your testimony today. I understand each of you have brief statements. We will begin with those now.

Mr. Block, we will begin with you. I trust you will each take just a few minutes in your comments.

Mr. Block, you may proceed.

STATEMENT OF L. THOMAS BLOCK, BANKERS' ASSOCIATION FOR FOREIGN TRADE

Mr. BLOCK. I am Tom Block, a senior vice president of Chemical Bank in New York. I am here to testify on behalf of the Bankers' Association for Foreign Trade.

BAFT is a trade association of virtually all U.S. banks that are actively involved in international banking, including especially the

financing of U.S. trade. The letter of credit is used by all of our member institutions for financing trade transactions and is the cornerstone of international trade banking.

The overriding importance of the letter of credit is that it allows buyers and sellers of goods in different countries to conduct transactions that otherwise would not occur because of credit or other risk considerations.

Anything that undermines the legal validity of letters of credit directly undermines the flow of international trade.

In a typical letter of credit transaction, a customer of a bank, known as the account party, will request his bank to issue a letter of credit for the benefit of a third party, known as the beneficiary. Usually, the account party is a buyer of goods from a beneficiary, the seller, which is unwilling to ship on open account terms.

Instead, the seller wants assurance from the buyer that if the seller ships its goods, it will be paid by the account party's bank. The beneficiary, the seller, thus does not have to rely on the credit of the buyer to pay. Instead, the seller can rely on the credit of the buyer's bank.

In this regard, the buyer's bank issues a letter of credit in favor of the beneficiary, the seller, which is a separate legal contract assuring the beneficiary that it will be paid upon the presentation of certain documents, usually shipping documents.

The two critical legal principles of letters of credit law are that the obligation of the issuing bank to pay the beneficiary is separate from any underlying contract between its account party, the buyer, and the beneficiary, the seller, and the issuing bank only pays upon the receipt of documents that strictly comply with the terms of the letter of credit.

Because a buyer's bank is often unknown to a seller, the issuing bank will often arrange to have a bank in the seller's country either advise or confirm the letter of credit which it issues.

If a local bank becomes a confirming bank, it becomes liable to pay the seller (beneficiary) under the terms of the letter of credit. Should the local bank serve only as an advising bank and advise the letter of credit, it acts merely as an agent of the issuing bank and does not become liable to the seller, the beneficiary.

Proposals have been made that violate these established principles of commercial law by requiring the payment of blocked Iraqi funds to U.S. beneficiaries of letters of credit which have not complied with the terms of the letter of credit with the issuing bank.

In addition, the proposals could require advising U.S. banks to pay beneficiaries out of blocked funds, even though such banks acted solely as agent for the issuing Iraqi Bank.

In this regard, the proposal appears to be based on a misconception that Iraqi banks which issued letters of credit on behalf of Iraqi buyers of U.S. goods, earmarked funds in special accounts by advising U.S. banks to pay the letters of credit. This was not the case, as payments on letters of credit are generally made from a bank's general funds, not earmarked accounts. In addition, Advising Banks are not liable to the beneficiary on the letter of credit of the issuing bank. To suggest that Beneficiaries should be paid on letters of credit without complying with the documentation requirements of the credit or to suggest that advising bank funds are

earmarked to pay letters of credit would undermine fundamental legal principles in this area and cast a cloud of uncertainty over the willingness of U.S. banks to participate in letter of credit transactions financing U.S. exports.

The proposal would, in effect, create a special priority for certain sellers of U.S. goods in the distribution of blocked Iraqi assets at the expense of other claimants. This violates fundamental principles of legal fairness, as such payments may result in there being insufficient funds to pay other claimants. It is simply not wise public policy to legislate claims priorities on an ad hoc basis in response to particular constituent interests.

We believe the proposals mentioned could seriously impair the financing of U.S. exports and other international transactions. Therefore, BAFT strongly urges the committee to reject any amendment that may be offered concerning payments on letters of credit from blocked Iraqi funds.

Chairman HAMILTON. Thank you very much, Mr. Block. Mr. Byrne.

STATEMENT OF JAMES E. BYRNE, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY

Mr. BYRNE. Thank you, Mr. Chairman.

I should mention that until 5:30 yesterday afternoon, I was not aware that I was going to appear before the committee. I taught a class from 8 to 10 p.m., and so the material that I have made available to you was put together hastily, and I have no intention of reading it to you.

What I have given you is, first of all, an attempt to delineate some of the principles which govern letters of credit law and practice in a brief five-page statement.

I have also made available to you, although I don't know if it has been distributed, some of the fundamental sources of letters of credit law and practice, UCP 400, 500, Article 5 of Uniform Commercial Code, the U.N. Commission on International Trade Laws draft proposal on standby letter of credit—which is a proposal by the United States of America—and proposed rules for a convention on international letters of credit and independent guarantees, and the U.S. Council on International Bank's Reimbursement Guidelines.

These materials are relevant to the issues before the committee today. With respect to a letter of credit, this is a vital component of U.S. international trade. In my own estimate, there are approximately $560 billion outstanding by banks around the world which are available to facilitate international trade.

U.S. banks have played a leading role in this industry since the first world war and have played a major role in the formulation of international rules which are based on principles of comity and an attempt of fairness with regard to all parties to the transaction.

It is because of this perceived fairness in the market with respect to the rules that govern letter of credit practice that the letter of credit has become the quintessential instrument for international trade facilitation and finance.

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In the United States, there are a variety of types of letters of credit. There is no point in going into them. Mr. Block has well stated a typical example of a commercial letter of credit.

Although I should mention that there are also involved in the implications of decisions that you are making performance standby letter of credit and financial standby letter of credit which are widely used in the United States and which are being used increasingly throughout the world.

So that the extent of your decisions have some ramifications on the ability of the U.S. banks and their reputations in the international market goes well beyond the context of commercial letters of credit in typical sales transactions.

The key to understanding a letter of credit is that it is essentially an intermediated transaction. A letter of credit issuer and the banks which work with it are, in effect, middle men. They do not themselves engage in the underlying transaction either as buyer or seller. Their role is essentially of an intermediary character. They are, if you will, a trusted pay master, and that is essentially what it is that is so useful about the letter of credit.

The features that Mr. Block spoke about, the independents of the letter of credit, and a feature which he did not speak about, its documentary character, are intertwined and foundational to understanding how the instrument works. It is a mercantile instrument.

The law which governs letter of credit is largely skeletal and largely follows international banking practice because no one country can provide law that would govern this instrument because it essentially and quintessentially is an international instrument.

Because there is no international source of law which is enforceable, the merchants themselves have had to formulate principles. From an academic point of view, this is in my experience, the best example I have ever seen of an effective international law, even though it has not been promulgated by anyone with the power or ability to enforce it but is almost universally followed and respected.

The attempt of banking practice and the UCP is to facilitate the reasonable expectations of the parties and to provide for certainty in the enforcement of it. The essence of it is that correspondent banking relations must be respected and where payments have occurred or irrevocable undertakings have taken place that those undertakings must be respected.

With respect to the legal character of the obligations of the parties involved, this perhaps is the question that many Members of the committee have.

I call your attention to page 3 of the paper that I have prepared which attempts to delineate the various responsibilities of the parties to the letters of credit and to provide you, for purposes of your staff's information, with citations to the various statutory and rule material which I have provided for you.

Essentially, the issuer of a letter of credit is an entity which undertakes to honor upon the presentation of conforming documents—this is a conditional undertaking. It is not a negotiable instrument because, as you may recall, it does note comply with the requirements of section 3104 of the Uniform Commercial Code

which requires that a negotiable instrument be an unconditional undertaking.

A confirmer is like an issuer in that it also makes an irrevocable undertaking to honor upon presentation of informal documents. The honor may occur by payment when the documents are presented, or it may occur by virtue of an acceptance which is assigned engagement on a draft which is presented which will then mature at a period of time to follow.

In some instances these are traded on a secondary market which is maintained by the New York Fed which averages approximately $70 billion in bankers acceptances. Or it may have require a deferred payment undertaking which again is analogous to an acceptance but in which there is no signed engagement upon a draft.

Distinguished from both, the issuer and confirmer is an advisor. An advisor makes no undertaking with respect to the letter of credit. The advisor simply checks the authenticity of the letter of credit and communicates it to the beneficiary.

I think there has been a great deal of discussion, at least in the preliminary conversations that I have had with people, attempting to distinguish between issuers, confirmers, and advisors.

I would submit to you though that there are a whole series of other relationships which impact upon this which also ought to be taken into account. The issue is really not whether a bank is an advising bank but whether it has been nominated in the letter of credit as a paying bank or whether it has been the recipient of a confirmed reimbursement obligation from another bank or whether it has been nominated in the letter of credit as a negotiating bank.

Each of these entities have certain legal obligations running to them once they have paid under the letter of credit against conforming documents.

But the critical benchmark, if you will, with respect to letter of credit law and practice is the presentation of conforming documents and payment upon that.

At that point, from the point of view of the correspondent banking system, obligations arise in which the banks would expect to receive funding.

With respect to the beneficiary, the beneficiary is certainly the recipient of a contractual undertaking or a mercantile undertaking with respect to the letter of credit.

To discuss the beneficiary's position in terms of rights seems to me a rather odd proposition. The beneficiary is entitled to payment upon presentation of conforming documents to those entities which have made the undertaking, in the first instance the issuer of the letter of credit and, if the letter of credit is confirmed, the confirming bank.

I hope this is of some use to you. I would be delighted to answer any questions that you have.

Chairman HAMILTON. Thank you very much. We especially appreciate the fact that you had such short notice. And thank you for coming under those circumstances.

[The prepared statement of Mr. Byrne appears in the appendix.]

Chairman HAMILTON. Mr. Lewis.

STATEMENT OF ANTHONY LEWIS, PRESIDENT, KLEIN-BERGER COMPANY

Mr. LEWIS. Thank you, Mr. Chairman. I am Anthony Lewis. I thank this congressional body for inviting me here.

I come here as an employee, as a citizen, as an employer, and president of a company, a small company in terms of a balance sheet that represents almost 1,000 employees throughout this country mostly in small rural farm communities.

I come here also as a Gulf War veteran. I believe that my experiences throughout the commercial business world and my military experiences gives me a special sensitivity for all of these issues.

Before I go any further Mr. Chairman, other companies that support this act have submitted a letter. And with your permission, I would like to submit that statement from these companies for the record which describes their situations and what we are trying to achieve with this bill.

Chairman HAMILTON. Without objection. You have the letter? Thank you.

[The information appears in the appendix.]

Mr. LEWIS. I guess, as an individual, I find myself in a very frustrated position and frustrated for two reasons.

Number one, yes, I went and did my duty for my country, only to come back and find that my company's balance sheet was almost decimated, the employees wondering whether we are going to continue. Many employees have asked that question.

And more frustrated because of my several attempts to rationalize and even appear before OFAC and have them hear our case.

I submit that it took me three phone calls after I had already received an invite from OFAC and then I was still turned down when the letter said you should call and get an appointment. I called for an appointment and still couldn't get one.

So thank you for inviting me because I thought this is what being a citizen was all about.

I am here to urge you to take the proper action and do what is fair and legal for all Americans. I have submitted a statement of my own which I think all of you have, and I will try to highlight the points of that.

I was a member of the military, and still am in the reserve, although on inactive status. I was in for 25 years as an active member and flew various jet aircraft.

Ironically, my summer camp involved a special training mission 1 week before I was called to go over on approximately August 4 of 1990. I had no idea and sat through many briefings, intel briefings at the top secret level, that there was any problems in Iraq.

I got home on a Sunday night from my 1-week training camp, went to bed at 9 o'clock and at 12:10 got a call and was on my way to the Middle East the next morning at 7:30.

I have no sympathy for Saddam Hussein. We support, I support personally, my company supports the President's authority to freeze the Iraqi assets. We support the help and everything that should go rightfully to the veterans. No one supports the sanctions against Iraq and the Iraqi Government more than I do. But please be sure that when we do this that we are punishing Iraqis and we are not punishing ourselves.

I have personal reasons for that as well as business reasons. A personal reason is that one of my fellow airmen was shot down and killed over there. The other is, I support the policies of this country. I think I might give you a little background as to—although you have it in the statement—as to our truly unique situation.

As stated in the statement, we had been doing business with Iraq in the capacity of shipping them food from 1987 until the embargo. We had done this business in a commercially accepted manner, and I think that was communicated pretty well by Mr. Byrne.

We had irrevocable, unconfirmed letter of credit, a typical acceptable commercial practice in our business for these estimates of $1 to $2 million parcels of food. LC's were nothing new to us, in fact to the world. LC's go back to the middle ages.

The money at issue here was the last shipment of a string of shipments utilizing this commercially acceptable tool of an irrevocable unconfirmed letter of credit where we called the U.S. Bank. The bank acknowledged the funds were there. We shipped. We gave the documents. They were received. They were acknowledged. And payment always was facilitated normally 10 to 20 days after the acknowledgment telex from the Iraqi Rasheed Bank, I believe it was.

This is normal in our business. As a matter of history—and I have spent—after I got off active duty in 1972, I spent the rest of my career in the food business. Countries, especially governments, that buy food, medicine, it is very usual to do this type of an instrument. There is no need for confirmations and, in this particular case, we had been as a company—we had been solicited with U.S. Government sponsored visits by various Iraqi food agencies to look at our peas and our beans and our food and say you should buy our food. That, as a matter of course, I believe started approximately in 1987 and continued. And we had built this business on a revolving basis.

In this particular case, the shipment arrived. This particular shipment was shipped as the last of a series, arrived, documents in order, prior to the embargo. It was accepted by the Iraqis, documents were presented in order to the bank. Payment instructions were received 10 days after the embargo from the Iraqi bank. And I have a copy of that telex which acknowledges that. We, prior to that shipment again and during the shipment, made sure the money was at the bank.

In my statement on page 2, paragraph 3, I have articulated the basic rule of letter of credit. I will read those three paragraphs so there is no misunderstanding as to what our situation was.

The basic rule of letter of credit law is that banks that issue or confirm letter of credit undertake an obligation to pay the letter of credit beneficiary upon presentation of certain documents as specified in the letter of credit. Treasury has recognized this principle in its Iraqi Sanctions Regulations which authorize the Treasury to issue licenses in cases where goods were shipped before the Gulf War based on letter of credit issued or confirmed by U.S. banks.

Our proposed remedy would simply treat U.S. exporters the same way as Treasury has already treated the U.S. banks. The fact is, our $1.9 million, plus our interest, is a receivable on our books and is recorded as an asset on our balance sheet. The Iraqi issuing

bank records this as a payable which is a liability on there balance sheet. This is in accordance with all GAAP accounting principles. To prohibit an American company from receiving its assets is to freeze or protect an Iraqi liability, the exact opposite of the President's intent.

The Iraqis have no interest in this money. We have a tested telex from them acknowledging this fact. Allowing the U.S. Government to hold on to this money will not punish Iraq. It will punish an American company, my company, its employees, myself, and all their families that supported what we did and what I came back from to face.

Last December, in a case with a related fact pattern, U.S. District Court Judge Stanley Sporkin found that once that contract was performed, ownership of the funds passed in the Iraqis to the American Government. We believe this reasoning should be followed for all similarly situated companies. Our money should not be caught up in the asset freeze because simply—and from a common sense perspective—it is not Iraqi money. It is American money.

In summary, we are a small business. Yes, we belong to a larger corporation that provides some working capital, but they don't run our business. They rely on people. They rely on us.

We are a small business made up of just regular folks seeking jobs, justice, and peace. We do not dispute the power of the President to freeze Iraqi assets. However, OFAC we believe has improperly administered the freeze by failing to separate funds belonging to U.S. citizens from those belonging to Iraq. In other words they have commingled the assets.

I can't understand why OFAC only addressed the problems relative to the large bank lobby and simply forgot the U.S. business people, their families, the employees, and the businesses that support these businesses throughout America.

It is simple to me: Iraq deposited the money in a U.S. account to pay for goods that we shipped to them prior to the freeze; the U.S. Government has now commingled these funds arbitrarily and capriciously through an action of OFAC.

Once we performed, these funds became ours and shouldn't have been included in the freeze of Iraqi assets. Iraq has no claim to these funds and has stated so. But they have at this point free food. And I hope they are not laughing about it too hard. It is not fair to American workers and companies all over this great country. And to name a few, our businesses are in towns of 200 and less predominantly.

So when we lay off 5 people—and as a result of this in 1991, we had to lay off 11 or 14 people—when we do that in one town, it is a big percentage of the population. It is from towns like Othello, Washington; Eden, Idaho; Cavalier, North Dakota; which I believe is approximately 30 people, Brush, Colorado; Alicia, Michigan; Goodland, Kansas; Gerring, Nebraska; Pleasanton, Texas; Helm, California; Perham, Minnesota, just to mention a few. It is not from New York and Chicago and big cities like that.

I went for 10 months to Desert Storm not only because I was ordered to go there but because Congress supported it, quite a change from my Vietnam days.

Now I ask Congress to finish that mission of Desert Shield and Desert Storm in the capacity of equitable treatment of the U.S. citizens but continue to punish the Iraqis not the U.S. citizens that were involved.

Don't allow there to be a distinction between the banking industry and the American business workers, employees, families, and all the businesses that support and do business with us in all these cities around America.

Do what is right, fair, and legal not what is capricious and arbitrary as OFAC suggests.

When I came back—when I was over there. We received a lot of letters from America. You know you had a box that said "Any Serviceman," you came back from a mission and pulled it out and read it and wrote letters back. It was mostly from school classes. Children were educated, second grade people, mostly in towns that I named off, and other towns where we never new the people. These people, when I came back—and it may be hard for some of you who weren't there to understand this—these people were proud. They gave me a little reception in a little town in Minnesota, and I can't help but articulate back to you the feeling I had that those people were the real heroes. Congress and this country supported what we did over there.

As a service person, we are just doing our job, as we should. So I urge Congress to do what is fair and right for all of those people. Let's punish the Iraqis but be careful not to punish U.S. citizens.

Chairman HAMILTON. Thank you. Mr. Magill.

STATEMENT OF JAMES MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICES, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. MAGILL. Thank you. On behalf of more than 2.2 million men and women of the veterans of foreign wars of the United States, I thank you for the opportunity to present our views with respect to providing a fair and orderly system for the distribution of claims of U.S. nationals and the United States against the Government of Iraq. The VFW is appreciative of this subcommittee for holding this hearing and demonstrating its commitment to ensure an equitable solution be reached in the distribution of these claims.

The proposed Iraq Claims Act would provide a specific schedule with respect to the disbursement of frozen Iraqi assets. This schedules would also establish, as a priority, noncommercial individual claims such as Desert Shield and Desert Storm veterans. This is the only prior category established by the act, and all other claimants are treated equally.

Now it is our understanding efforts are being made to replace the veteran priority with a small group of businesses that hold foreign-issued or foreign-confirmed letter of credit.

Mr. Chairman, we in the VFW believe that the veterans of Desert Shield and Desert Storm should retain there priority status. These are the men and women who went to the Persian Gulf area; fought the war; and, in some cases, suffered personal injury, material losses, and even death.

If there is anyone who has earned his priority, it is our service men and women, the active reserves and guardsmen, who despite the great risk of death have received little or nothing.

In contrast, it should be noted that commercial claimants voluntarily entered into financial commitment with the Iraqi Government knowing only a financial risk was at stake. I don't want to give the impression we are against commercial claimants receiving a fair share in a settlement action.

However, we are and will remain committed to protecting the rights of our Nation's veterans. While commercial entities have substantial legal and financial resources to pursue there interests through the judicial system, veterans are less fortunate. In the race to the courts, the individual claimant is definitely hobbled.

Mr. Chairman, we do not believe veteran claims are going to amount to a large sum. We only ask that you and your subcommittee offer some degree of protection to those who fought the wars and allow them to retain there priority status so as to ensure that they receive there fair share.

This concludes my statement. I will be happy to respond to any questions you have.

Chairman HAMILTON. Thank you very much, Mr. Magill.

The Chair has a letter from AMVETS that I would like to make part of the record.

Without objection that will be done.

[The information appears in the appendix.]

CONFIRMED LETTER OF CREDIT AND ADVISORY LETTER OF CREDIT

Let me begin by asking a few questions about this confirmed letter of credit and advisory letter of credit which you are very familiar with but the Chair is not.

Just give me a nice clear simple distinction. What is the difference between a confirmed letter of credit and an advisory letter of credit?

Mr. BLOCK. If you are a seller of goods you are——

Chairman HAMILTON. Which would you rather have?

Mr. BLOCK. A confirmed letter of credit. But we charge more for a confirmed letter of credit.

If you are the seller of a good to a foreign country, Iraq, you are issued a letter of credit from an Iraqi bank, Bank Rafidain is the main bank of Iraq. When you hold that instrument, you are holding Iraqi risk. You are dependent upon an Iraqi bank to pay you for the selling of that good.

You have two options. You can go to your local bank and say, I don't know this bank. Is it a bank? Help me out here. And the bank says, I know this is a bank. I have the ability to act as a middleman. And that is what I will do; I will receive funds from that bank. And when I have those funds, I will pay you.

It is hard for the small businessman in Nebraska or Indiana or some place else to have relationships with a bank in Baghdad. So the bank will provide that service.

We don't charge much. We act as a middleman. We have no guarantee that that bank will pay up. We are there simply to provide a service. We know the bank is there. We know that person. And we will deal with them.

If we confirm that letter of credit, we are saying you no longer have Iraqi risk. You have U.S. bank risk, Chemical Bank.

Chairman HAMILTON. The bank takes on the obligation to pay?

Mr. BLOCK. The bank takes on the obligation to pay.

Chairman HAMILTON. When does the bank decide it is going to be a confirming bank? Do you have to have the money in your hands?

Mr. BLOCK. No. We will make a decision—we look at the credit of the bank that issued the letter of credit, in other words Bank of Rafidain.

If we feel comfortable that that bank is going to pay us back one way or the other, then we will say, we will confirm this letter of credit. So we remove from that seller's list of concerns that the Bank of Rafidain will not be there to pay.

Chairman HAMILTON. What is an advising bank?

Mr. BLOCK. An advising bank says, we will act as intermediary and pass the papers back and forth. And when we have money from the Bank of Rafidain, we will pay you. If we have money from the Bank of Rafidain, the day the LC is presented, we pay you then. But we take on no obligation to make that payment.

Chairman HAMILTON. Mr. Byrne, do you agree with that in general?

Mr. BYRNE. In general but not with the last statement. I disagree with respect to an advising bank as such. An advising bank has absolutely no undertaking at all with respect to payment. The question would be whether in the letter of credit not that it is a advising bank but whether it has been named as a paying bank. Advice has nothing to do with it. You are asking the wrong question.

To categorize this as an issue between advising and confirming banks I think is to mischaracterize it. The issue is, what do you do with a letter of credit where there is an irrevocable undertaking by somebody, i.e., issued or confirmed, and in that case the bank is obligated, or where the bank is entitled to pay and has done so. Otherwise, even if you are nominated as a paying bank and the documents are presented, you can say, sorry, I am not about to do it.

S. 1119

Chairman HAMILTON. Are you familiar with S. 1119?

[The text of S. 1119 follows:]

103D CONGRESS
1ST SESSION

S. 1119

To amend the International Emergency Economic Powers Act to provide for the payment of certain secured debts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 15), 1993

Mr. ROBB (for himself, Mr. DOLE, Mrs. MURRAY, Mr. HELMS, Mr. CAMPBELL, Mr. WARNER, Mr. KERREY, Mr. HATCH, Mr. EXON, Mr. FAIRCLOTH, Mr. BROWN, Mr. SASSER, and Mr. BOND) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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A BILL

To amend the International Emergency Economic Powers Act to provide for the payment of certain secured debts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Secured Payment Act of 1993".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) a number of United States corporations and their foreign subsidiaries engaged in lawful trade with Iraq and fulfilled their contractual or letter of credit obligations before August 2, 1990, but have not been paid;

(2) since August 2, 1990, pursuant to Executive Orders No. 12722 and No. 12724, the Department of the Treasury has frozen Iraqi assets in the United States, including funds sufficient to pay the debts described in the preceding paragraph, even though (A) payment is secured by irrevocable letters of credit, and (B) the transactions covered by the letters of credit are otherwise complete; and

(3) the Department of the Treasury has no jurisdiction over such funds.

(b) PURPOSE.—The purpose of this Act is to provide for the immediate release to the lawful owners of the funds described in subsection (a)(2).

SEC. 3. AMENDMENT OF THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

(a) GRANT OF AUTHORITY.—Section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)) is amended—

(1) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(2) by inserting "(1)" immediately after "(b)";

(3) by amending paragraph (1) (as redesignated)—

(A) by striking out "or" at the end of subparagraph (B);

(B) by striking the period at the end of subparagraph (C) and inserting "; or"; and

(C) by adding at the end the following new subparagraph:

"(D) payments under irrevocable letters of credit issued by a United States or foreign bank, from any type of account, of amounts owed to or for the benefit of a national of the United States, including any foreign subsidiary or branch thereof, that is the beneficiary of an irrevocable letter of credit and that shipped the goods, or otherwise performed its obligations under an underlying contract, before the declaration of any national emergency under section 202."; and

(4) by adding at the end the following new paragraph:

"(2) Paragraph (1)(D) shall not apply to any United States national who is found to have violated the Export Administration Act of 1979, the Arms Export Control Act,

or any license, order, or regulation issued under either Act.".

(b) APPLICATION OF AMENDMENTS.—The amendments made by subsection (a) apply to actions taken by the President under section 203 of the International Economic Emergency Powers Act before the date of enactment of this Act which are in effect on such date and to actions taken under such section on or after such date.

Mr. BYRNE. I have seen it.

Chairman HAMILTON. How does the enactment of that bill, if it is enacted, affect existing letter of credit laws that pertain to these international bank transactions?

Mr. BYRNE. Depending on how one reads this, and I presume you are speaking about section 10. I am reading S. 1281. It is not the same I guess.

Mr. BLOCK. The problem is that, as Professor Byrne has said in his opening statement, what we do is we rely on the documentation, that it has been shipped.

If we have this language that says it has been shipped or otherwise performed, we will be in court with every single letter of credit because everybody who wasn't able to perform will say, well, I otherwise performed.

The litigation expense will be so great that we won't be able to reasonably price letter of credit. To have something in the statute that it has been performed or otherwise performed is simply——

Chairman HAMILTON. I am trying to understand just what the impact of the Senate bill is.

Mr. BLOCK. The impact of the Senate bill is to severely limit the participation of American banks in financing international trade in the developing world. In other words, I think probably, no matter what you do, there is probably some way I can work out something with Japan. We are two very strong countries, complete predictability in payment; and I am not really concerned about blocking orders against Japan. I guess at one point we were.

But if I am looking at an Iraq or any developing country, I have to have real legal certainty. And to have something in the law that says I may have to pay even though the goods weren't shipped, I simply cannot take that risk; and I am going to have to severely curtail my letter of credit operations.

As I think everybody said, letters of credit are the backbone of the way international trade is financed. And I don't think we want to put ourselves in that position.

Chairman HAMILTON. Mr. Byrne.

Mr. BYRNE. I am not sure what the operative verb is in S. 1119. I was looking at the other bill.

The critical language here may be "released to pay such letters of credits." The point is that if conforming documents aren't presented, there would be no payment under the letter of credit regardless of whether the funds were released or not.

The underlying transaction is not something that a bank is able to do. In fact, the comptroller of the currency has promulgated regulations which prohibit banks from making an assessment on anything but documents. Banks aren't able to go out and say, have you performed the underlying transaction.

As I understand the state of things, under the current regulations as implemented by OFAC, there is a distinction made for situations where banks have made irrevocable undertakings or have paid, pursuant to an understanding that they would be reimbursed where they were nominated or authorized to do that.

If the discussion is whether that provision should be changed or the ability of OFAC to make that distinction should be withdrawn,

Mr. Block is correct; our ability to control our own trade finance will simply cease.

DISTINCTION BETWEEN LETTERS OF CREDIT

Chairman HAMILTON. Let me put it this way: We have a limited number of assets. You have a lot more claimants than you have assets. Everybody is trying to get a priority position. Everybody makes a good case for being in a priority. Unfortunately, we don't have enough assets to cover all the claims.

Should we have a law here that gives a person with a confirmed letter of credit or an advisory letter of credit, do we put them first in line?

Mr. BLOCK. I think you are talking about advised letter of credit here.

Chairman HAMILTON. I am talking about both. Take the confirmed letter of credit, in that circumstance, should you put that person at the front of the line?

Mr. BLOCK. I believe that person has already been paid, that OFAC traditionally says that this person——

Chairman HAMILTON. That person has a prior legal claim?

Mr. BLOCK. Yes.

Chairman HAMILTON. How about the advised letters of credit?

Mr. BLOCK. The advised letter of credit, you are a claimant just like anybody else.

Chairman HAMILTON. You have no priority?

Mr. BLOCK. You have no priority.

Chairman HAMILTON. Do you agree with that, Mr. Byrne?

Mr. BYRNE. I don't see the difference between someone who has performed and shipped on open account and someone who has not presented documents under a confirmed letter of credit.

Chairman HAMILTON. So what are you telling me?

Mr. BYRNE. I don't think there is a distinction between a businessman who doesn't have a letter of credit and somebody who has one that is not confirmed.

Chairman HAMILTON. What you are telling me is that, in terms of priority in your judgement, there is no difference between the confirmed letter of credit and the advised letter of credit?

Mr. BYRNE. No, sir, I am not. You are asking me with respect to an advised letter of credit.

With respect to a confirmed letter of credit, I think you have got a different situation. There I guess the question comes down to what emphasis do you want to put on our ability to finance our trade?

Chairman HAMILTON. The confirmed letter of credit I think is clear. The advisory letter of credit, should they go to the front of the line?

Mr. BYRNE. Should somebody who is shipping on a credit basis and has performed, and the Iraqis have the goods, should they go to the front of the line?

Chairman HAMILTON. What is your answer?

Mr. BYRNE. My answer is, that is your decision, sir. I think you ought to set a policy. I don't think you ought to let the courts do it.

Mr. BEREUTER. Will the gentleman yield for a brief followup question?

Chairman HAMILTON. I have got an appointment at 11:30, so I am going to ask a few more questions. But go ahead.

Mr. BEREUTER. I wanted to ask Dr. Byrne if in fact the advisory bank has received the payment from the Iraqi bank, it is sitting there in the American bank, that is in an advisory capacity but the freeze hits them before they can give it to the business.

Is there a distinction for a public policy consideration?

Mr. BYRNE. If I may, I would just as soon you not characterize this as an advising bank. You are talking about a bank which has been authorized under the letter of credit to pay but which is not itself obligated on the letter of credit to pay.

I guess the question is: Are there segregated funds which have been particularly allocated to this letter of credit? My understanding is that, as OFAC has implemented the regulations, that in that session where funds are specifically segregated for that account that it is possible to apply for a license.

The question I guess would be one of equity, whether or not, under those circumstances, you want to accord a greater priority.

And I am glad it is you that is making the decision and not me.

Chairman HAMILTON. What we have in front of us here, we have the veterans testifying that they should be in the front of the line. Most of us would be quite sympathetic to that. Mr. Lewis thinks he ought to go to the front of the line.

How do you folks sort this out for us?

Mr. Lewis, we understand where you are.

Mr. Magill, we understand where you are.

Mr. BLOCK. We feel that the thing to do is to pass the Iraqi claims bill.

Chairman HAMILTON. As introduced in the House?

Mr. BLOCK. Right.

Chairman HAMILTON. Is that your view, Mr. Byrne?

Mr. BYRNE. I think the tough policy decision which is before you is essentially whether commercial interests which have been encouraged to trade with Iraq are entitled to some type of priority in this. And that is a hard question to answer.

If you essentially equate them with the middle people who finance the trade, you are going to do some severe damage and undo something that has already been done, which is that America will not be able to finance its trade.

In terms of the commercial interest, it is hard for me to see what a letter of credit has to do with the position of the commercial interests.

Whether they hold a letter of credit that they have not performed under or have shipped on open account and the goods are in the hands of the Iraqis, I see no distinction.

Chairman HAMILTON. Mr. Lewis, if I understand your position, the bill, S. 1119, would ensure that companies in your position are paid in full before other claimants have access to the same pool of funds.

Is that the position you are taking?

Mr. LEWIS. Basically. And that position is the only basis irrevocable letter of credit, unconfirmed in our case, where they were

fully executed, presentable to the letter prior to—as spelled out, prior to the sanctions. Because from a practical, common sense standpoint nobody is shipping anything there after the embargo; so there is nothing to talk about of open credit.

PRIORITY OF PRIVATE CLAIMS VERSUS ARMED SERVICE PERSONNEL CLAIMS

Chairman HAMILTON. This may be a tough question: Why should your claim take precedence over the veterans that Mr. Magill is talking about?

How can you justify putting your claim in front of the veterans?

Mr. LEWIS. I happen to agree as a veteran, and I said my arms are spread over the whole table with Mr. Magill.

However, the real issue is: What is an Iraqi asset, and what is a U.S. asset? OFAC has commingled these, which is our position; and that distinction has to be made first.

I believe without adding the numbers up that what I submitted you for the companies that I know of that have this comes to about $14 or $20 million maximum. People who shipped in accordance with irrevocable letter of credit, commercial instruments used for ages, and executed their contracts properly, you are talking about $20 million.

I think you can satisfy everybody here.

Chairman HAMILTON. Mr. Magill, do you know of service personnel who are pursuing their claims through means other than this bill now before the committee?

Mr. MAGILL. It is my understanding that there are still outstanding claims being held even prior to the Persian Gulf War. We go back to the U.S.S. *Stark* incident.

To my knowledge about individual claims now, I could not answer that question with authority.

If I could make a brief comment. I am in the same position you are as far as with my understanding of advised letter of credit, confirmed letter of credit. I don't pretend to be an expert on this, and I don't come before this committee as an expert on this.

All I would like to convey to the committee is that I don't believe that there are a large sum of money that is going to be claimed by these individuals.

NOTIFICATION PROCESS TO SERVICE PERSONNEL AND OTHER CLAIMANTS

Chairman HAMILTON. May I interrupt you and ask you this question: What types of notification regarding the process would be most useful to service personnel and other claimants who may not have lawyers or others asserting there claim? What kinds of notice could be given?

Mr. MAGILL. Of course notifying the Department of Veterans Affairs and, again, the VFW. And I am sure that I could speak for the other major veterans organizations—we put out a magazine that goes to every single member of the VFW. And that is 2.2 million.

We would be more than happy to do whatever we could do to get the word out to our members and also through public service announcements for those people that do not belong——

Chairman HAMILTON. Your view is it would not be a large number of claimants?

Mr. MAGILL. I don't believe that it would. I am concerned that should the commercial interests have a priority, there may be nothing left for the individual.

Chairman HAMILTON. Well, that is the problem we are wrestling with, of course.

I apologize for having to leave. I will ask Mr. Gejdenson to take over the Chair, and I will recognize Mr. Bereuter first.

Mr. BEREUTER. I yield to Mr. Manzullo.

VETERAN'S CLAIMS

Mr. MANZULLO. My question is to Mr. Magill and Mr. Lewis. I have had conversations with Congressman Steve Buyer, who is an Iraqi war veteran. He has advised that upwards of 8,000, other than the 4,000 who were listed as injured when the war ended, have gone to VA hospitals with illnesses that are physiological resulting from exposure or from ingestion of chemicals in the Gulf War.

Would any of you gentlemen wish to comment on the number that has been explained to him?

Mr. LEWIS. Let me go first. But I am sure that Mr. Magill has better information than I do.

I was over there as a pilot. I am sure most of these claimants are probably—and I would doubt if there are any pilots—but are probably ground personnel who engaged themselves continuously in an area where these chemicals were. I have no knowledge of that.

From the air battle, I know of no claimants whatsoever from the air battles, which would seem logical.

Mr. MAGILL. What I could add on this—there is legislation advancing through the Committee on Veterans Affairs now that would give priority health care to any veteran who suspects that he is suffering from what, I guess for want of a better term is the "mystery disease," as it is being referred to.

As far as numbers, there are more and more who are coming forth every day. This being the case, because there is being more attention given to it, and the more the veteran realizes that maybe this cold he has had or nausea is being shared with a lot of other veterans, then he is going to VA.

So as far as specific figures, I would not challenge the Congressman's figures on it. I think probably those numbers are going to grow as more and more veterans realize that they may have something that is related to their service in the Persian Gulf.

Mr. MANZULLO. The reason that I raise that question is that there is a $100,000 cap in this bill, and 8,000 times $100,000 is $800 million.

Mr. GEJDENSON [presiding]. Would the gentleman yield?

I think the cap works this way: There is $10,000 for each individual or corporation in the first round—up to $90,000, the military has a cap, the minimum I guess.

Mr. MANZULLO. But the military has priority.

Mr. GEJDENSON. The military has a priority of $90,000, and all claimants would compete for what is left. This is not to say that

each person in the military category would get the hundred thousand dollars or only a $100,000.

AMERICAN COMPANIES DEMANDS FOR PAYMENT OF IRAQI FUNDS

Mr. BEREUTER. Reclaiming my time, I would like to ask Professor Byrne a couple of questions.

When the Iraqi bank instructed the U.S. reimbursing bank to honor the American companies' demands for payment and there were sufficient funds to honor the demand, did the U.S. reimbursing bank have an obligation to honor the payment demand?

Do you have an opinion on that?

Mr. BYRNE. Under letter of credit law, no, assuming it had not confirmed the letter of credit.

Mr. BEREUTER. The answer was no?

Mr. BYRNE. The answer is no.

Mr. BEREUTER. When the Iraqi issuing bank transferred the funds to the U.S. reimbursing bank with instructions to pay, was there an equitable transfer of title to the funds to the U.S. company or beneficiary?

Mr. BYRNE. Under letter of credit law, no. In terms of an equitable determination, certainly as between the Iraqi company and the U.S. company, a court of equity may so determine. But this is not a question that would be determined under LC policy.

There is no right of the beneficiary that would arise in that situation vis-a-vis the U.S. bank.

Mr. BEREUTER. Finally—I think you have hinted at this already Professor Byrne—what is the implication on export—American exporting of what we are attempting to decide here?

What is your suggestion about the implications, if any that you care to draw?

Mr. BYRNE. Actually, Mr. Lewis would be the gentleman to ask. But certainly if I had been encouraged by the U.S. Government to engage in export transactions and found myself in a posture where I was discomforted as a result of it, I would think twice the next time that I was encouraged.

Mr. BEREUTER. Mr. Chairman, I appreciate being able to sit in and ask questions since I am not a Member of the subcommittee. Thank you.

Mr. GEJDENSON. Mr. Lantos.

PRIORITY CLAIM OF VETERANS

Mr. LANTOS. I paid two visits to the area, both to Saudi Arabia and Kuwait, just prior to the outbreak of hostilities and right after the conclusion of hostilities with the Majority Leader and the Republican leader and with the Intelligence Committee chairman and others.

There is no doubt in my mind that the priority claim of our veterans is unquestioned. If anybody deserves to have priority, it is our veterans. They deserve priority to all Iraqi assets. I have the advantage of speaking as a nonlawyer, which allows me to see things with a degree of clarity that only the Hungarian peasant mentality provides one; and it seems to me that you, Mr. Magill, are absolutely correct in asserting the priority of our veterans to Iraqi assets.

AMERICAN ASSETS BEING CONSTRUED AS IRAQI ASSETS

I think no commercial claim can interfere with the right of veterans who fought in that war. But for the life of me, I do not understand how American assets can be construed as Iraqi assets.

If, in fact, Mr. Lewis shipped products—and there is no question about this, these were accepted—the implicit transaction is that these products were to be paid for with Iraqi funds; and upon the delivery of these products the appropriate number of dollars became U.S. assets.

Now it adds a very special touch of poignancy to Mr. Lewis's claim that he in fact is a combat veteran of that war. He also happens to be a constituent of mine, and I want to publicly salute him for performing his duty as a reserve officer with such distinction. I do not believe that either Mr. Lewis or those of us who agree with his position for a moment claim that veterans should not get first priority on every dime, on every dime of Iraqi assets.

But for the life of me, I don't understand how veterans of that war can claim priority on assets which are not Iraqi assets. Those are not Iraqi assets. That transaction was terminated with the delivery of the goods.

And it seems to me that your testimony, Mr. Lewis, for a rational layman judging this issue by plain common sense, has enormous merit. You are not in favor, I take it, of pushing veterans into a secondary position are you?

Mr. LEWIS. No, sir.

Mr. LANTOS. You are in favor of veterans getting top priority to all Iraqi assets?

Mr. LEWIS. Yes, sir.

Mr. LANTOS. So am I. What you are suggesting is that, upon delivery of the goods by your company, the payment for those goods became American assets, this is analogous to an American company on the same day delivering the same goods to Switzerland or Uruguay or Australia or any other country. Once the goods are delivered, the corresponding number of dollars then became U.S. assets.

Is that your position?

Mr. LEWIS. Yes, sir.

Mr. LANTOS. I have no further questions, Mr. Chairman.

Mr. MANZULLO. I yield the balance of my time to Mr. Leach.

RIGHTS OF VETERANS

Mr. LEACH. A quick question. The discussion here has been about the rights of veterans, and that is pretty well resolved.

Then you have the rights of one commercial participant versus the rights of another commercial participant where there is some lack of resolution. But there has been no discussion of public claims.

COMMERCIAL CLAIMS VERSUS THE PUBLIC CLAIMS

One of the crucial questions at issue is, is there a presumption that commercial claims come above public claims; and is the Congress, in effect through any of these statutes, all of a sudden saying

the public claim comes second? Are there debts owed to our Commodity Credit Corporation?

Mr. Byrne would you want to comment on that?

Mr. BYRNE. As to whether there are debts owed to the Commodity Credit Corporation?

Mr. LEACH. No. But one issue at stake is the sensitivities between one commercial claimant versus another. But isn't another issue also all commercial claimants versus the public?

Mr. BYRNE. I would have thought in the bill that section 3(d) is the sleeper, because I thought that that gave the President power to determine what is appropriate between this fund and such other accounts as are appropriate for the payment of claims of the U.S. Government.

And then that vests with the President, the authority before anybody gets paid, if he chooses to, to a certain U.S. claims, to the extent that he deems appropriate.

I may be misreading it.

Mr. LEACH. But why in heaven's name do you pass a bill in which you give that kind of discriminatory power to the executive? An executive might want to accede to the commercial or he might not.

Mr. GEJDENSON. Would the gentleman yield?

The indication from the administration is that they would accept a proportional settlement without any priority placed on the government claims, so that we might look at adding that language if it helps the gentleman.

Mr. LEACH. I think that would be helpful. That is my view, that I don't think the public should come before commerce; but I don't think commerce should come before the public, and that proportionality is the proper approach.

Now whether within commerce there should be priorities, that is a really delicate issue which this committee has a hard time resolving. And the inputs of Mr. Block and Mr. Byrne are appreciated.

I simply would like to say that, from Mr. Block's perspective, some of the precedent involved in intermediary banking I think has to be understood as very significant.

Thank you, Mr. Chairman.

NUMBER OF VETERANS

Mr. GEJDENSON. Mr. Gallegly.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Like Mr. Lantos, I was in the Gulf right before the conflict; and I was in the first trip in right afterwards—a matter of days after the conflict.

Mr. Magill, while I have you here, I would just like to ask, do you have a ballpark number of how many veterans we have combined with World War II, Korea, Vietnam, and Desert Storm that are currently in need of housing, jobs, and social—any idea?

Mr. MAGILL. No, sir, I don't have. The veteran population is such a diverse segment of our society.

Mr. GALLEGLY. Is it reasonable to say that there are a lot of veterans from World War II, Korea, Desert Storm, and Vietnam that are in need of some kind——

Mr. MAGILL. Yes. A lot of veterans are not only unemployed but they are underemployed. And right now our estimate as far as homeless veterans is I believe about a third are veterans.

Mr. GALLEGLY. In light of that, Mr. Magill, are you aware of the government's current resettlement program that provides financial and other assistance to thousands of ex-Iraqi troops who fled or surrendered during the Gulf War?

Mr. MAGILL. Yes, I am aware of that.

Mr. GALLEGLY. Could you tell us what is the VFW's position on this policy and the position you might have on any pending legislation?

Mr. MAGILL. The VFW is adamantly opposed to the resettlement of any Iraqi troops. And I have to emphasize "troops." We do not have opposition to legitimate refugees, the Kurds, for example.

Mr. GALLEGLY. I am only referring to those that served in Saddam Hussein's army.

Mr. MAGILL. We are opposed to resettlement of those individuals to the United States.

Mr. GALLEGLY. Thank you.

Mr. GEJDENSON. Could Mr. Newcomb please identify himself.

STATEMENT OF RICHARD NEWCOMB, DIRECTOR OF FOREIGN ASSETS CONTROL, DEPARTMENT OF TREASURY

Mr. NEWCOMB. My name is Richard Newcomb. I am Director of Foreign Assets Control.

Mr. GEJDENSON. Since this case is under litigation, I won't ask you questions about this case. I am going to ask you a hypothetical situation.

A hypothetical situation is this: If the Federal Government were to seize assets and I felt as a citizen that some of those assets were wrongfully seized, can I go to court and try to secure my assets?

Mr. NEWCOMB. Yes.

Mr. GEJDENSON. So that if the Federal Government, in trying to seize assets of another individual or country seized assets that were legally mine, then nothing the Congress would do in an act of this nature would preclude me from recovering my assets?

Mr. NEWCOMB. Congressman, in markup testimony I gave last week, the question came up as to, would we abide by court decisions? I indicated at the time that we would.

We believe that the assets that were blocked are Iraqi property. We believed they were Iraqi property when we blocked them on the morning of August 2. And that is our position.

Mr. GEJDENSON. Maybe Mr. Byrne can deal with this.

In viewing how we are going to deal with international commerce and trade and making sure that people feel comfortable that letters of credit and other international transactions are respected, the American court system has long demonstrated relative fairness on these kinds of issues. If I can make my case in court, whether I am an American or a Swiss, claiming that my assets were wrongfully taken, doesn't that provide the kind of due process and protection that most international commerce is worried about?

Mr. BYRNE. With respect to the corresponding banking system, if you wound up in court, you would be in trouble. But I don't think

there are any complaints with respect to the position that OFAC has taken with regard to those funds.

With regard to situations where there is a question regarding equitable interests in funds, it would seem to me neither an administrative agency nor certainly a bank is in a position to make equitable determinations of that sort.

Mr. NEWCOMB. If I might add to that, that question was litigated in the Iran situation. As far as the authority of the President in these freeze-kind of situations dealing with assets and settling claims, I would like to submit for the record the case of *Dames & Moore* v. *Donald T. Regan,* a case which, in an opinion of nine to zero by the Supreme Court, goes to those very issues and puts forward the notions that you are speaking about.

[The information referred to appears in the appendix.]

Mr. GEJDENSON. Members will be given five legislative days to submit additional questions.

Mr. Lewis, I don't know anything about your company and frankly don't know the specifics to the degree that you do, I am sure. But what your basic claim is, is that the government wrongfully seized your assets. Is that correct?

Mr. LEWIS. That is correct.

Mr. GEJDENSON. Are you presently in litigation to recover those assets as wrongfully seized assets?

Mr. LEWIS. I am not sure of the legal definition.

Mr. GEJDENSON. Do you have a lawyer trying to recover [illegible] sets?

Mr. LEWIS. We are trying to take this action because, from a business perspective, these companies that I submitted for the record—you can go to court. But as you know and I know, we will all go broke doing that.

Mr. GEJDENSON. It seems to me that what we have here is that nothing in the legislation that is before the committee would injure your company if a court held that those were truly your assets. And that is the fundamental question that has to be dealt with.

If they are your assets, then you ought to get them back. But it shouldn't be, it seems to me, this congressional panel deciding whether they are your assets. If they are your assets, then a court is the place to establish that they are your assets.

Mr. LEWIS. I think it is a little more complicated than that. We can all go to court, but I think this is a common sense issue of a distinction between the banks who Mr. Newcomb took care of by saying those confirmed letter of credit, irrevocable, as ours were irrevocable—we will treat that differently because that is what I want. Sure we can go to court, but that is the issue.

Mr. NEWCOMB. Early in the program, a determination was made—not by OFAC but by the Treasury Department in consultation with the State Department, discussed at the National Security Council, codified in regulations and has been followed—that the payment on confirmed letters of credit would be allowed.

That was a policy decision which was not unilateral. It was an administration position, and it has been followed.

Mr. GEJDENSON. Thank you. I have to go vote.

The hearing is now adjourned.

Thank you.

[Whereupon, at 12:05 p.m., the committee was adjourned.]

MARKUP OF H.R. RES. 3221—IRAQ CLAIMS ACT OF 1993

THURSDAY, OCTOBER 28, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m. in room 2172, Rayburn House Office Building, Hon. Lee H. Hamilton (chairman) presiding.

Chairman HAMILTON. The committee will come to order. The first order of business is consideration of H.R. 3221, which the Chief of Staff will report.

Mr. VAN DUSEN. H.R. 322l, to provide for the adjudication of certain claims against the Government of Iraq. Be it enacted by the Senate.

Chairman HAMILTON. Without objection, further reading of the bill is dispensed with, printed in the record in full, and open to amendment.

[H.R. 3221 follows:]

103D CONGRESS
1ST SESSION

H. R. 3221

To provide for the adjudication of certain claims against the Government of Iraq.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 6, 1993

Mr. HAMILTON introduced the following bill; which was referred to the Committee on Foreign Affairs

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A BILL

To provide for the adjudication of certain claims against the Government of Iraq.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Iraq Claims Act of 1993".

SEC. 2. ADJUDICATION OF CLAIMS.

(a) CERTAIN CLAIMS WITHIN THE JURISDICTION OF UN COMMISSION.—The United States Commission is authorized to receive and determine the validity and amounts of any claims referred to it by the Secretary of State with

respect to which the United States has received lump-sum payments from the United Nations Commission.

(b) OTHER CLAIMS AGAINST IRAQ.—The United States Commission is authorized to receive and determine the validity and amounts of any claims by nationals of the United States against the Government of Iraq that are determined by the Secretary of State to be outside the jurisdiction of the United Nations Commission.

(c) DECISION RULES.—In deciding claims under subsection (a) or (b), the United States Commission shall apply, in the following order—

(1) in the case of claims under subsection (a), relevant decisions of the United Nations Security Council and the United Nations Commission;

(2) applicable substantive law, including international law; and

(3) applicable principles of justice and equity.

(d) PRIORITY CLAIMS.—Before deciding any other claim against the Government of Iraq, the United States Commission shall, to the extent practical, decide all pending noncommercial claims of members of the United States Armed Forces and other individuals arising out of Iraq's invasion and occupation of Kuwait.

(e) APPLICABILITY OF INTERNATIONAL CLAIMS SETTLEMENT ACT.—To the extent they are not inconsistent

with the provisions of this Act, the provisions of title I (other than section 2(c)) and title VII of the International Claims Settlement Act of 1949 (22 U.S.C. 1621–1627 and 1645–1645o) shall apply with respect to claims under this Act and the funds established pursuant to sections 3(a) and 3(c).

SEC. 3. CLAIMS FUNDS.

(a) UN COMMISSION CLAIMS FUNDS.—The Secretary of the Treasury is authorized to establish in the Treasury of the United States one or more funds (hereinafter in this Act referred to as the "UN Commission Claims Funds") for payment of claims under section 2(a). The Secretary of the Treasury shall cover into the UN Commission Claims Funds such amounts as are allocated to such funds pursuant to subsection (b)(1).

(b) ALLOCATION OF FUNDS RECEIVED FROM UN COMMISSION.—The Secretary of State shall allocate funds received by the United States from the United Nations Commission, in the manner the Secretary determines appropriate, between—

(1) the UN Commission Claims Funds; and

(2) funds established under the authority of the paragraphs under the heading "TRUST FUNDS" in the Act entitled "An Act making appropriations for the diplomatic and consular service for the fiscal

year ending June thirtieth, eighteen hundred and ninety-seven", approved February 26, 1896 (22 U.S.C. 2668a).

(c) IRAQ CLAIMS FUND.—The Secretary of the Treasury is authorized to establish in the Treasury of the United States a fund (hereinafter in this Act referred to as the "Iraq Claims Fund") for payment of claims under section 2(b). The Secretary of the Treasury shall cover into the Iraq Claims Fund such amounts as are allocated to such fund pursuant to subsection (d).

(d) ALLOCATION OF PROCEEDS FROM IRAQI ASSET LIQUIDATATION.—The President shall allocate funds resulting from the liquidation of assets pursuant to section 4 in the manner the President determines appropriate between the Iraq Claims Fund and such other accounts as are appropriate for the payment of claims of the United States Government.

SEC. 4. AUTHORITY TO VEST IRAQI ASSETS.

The President is authorized to vest and liquidate as much of the assets of the Government of Iraq in the United States that have been blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) as may be necessary to satisfy claims under section 2(b), as well as claims of the United States Government against Iraq which are determined by the

Secretary of State to be outside the jurisdiction of the United Nations Commission.

SEC. 5. PROGRAM ADMINISTRATION SELF-SUFFICIENCY.

(a) DEDUCTIONS FOR ADMINISTRATIVE EXPENSES.—In order to reimburse Executive agencies for their expenses in administering the Iraq claims program and this Act, the Secretary of the Treasury shall deduct an amount equal to 1½ percent—

(1) from any amount covered into the claims funds established under section 3(a) or 3(c); and

(2) from any amounts the Secretary of State receives from the United Nations Commission which are not covered into a claims fund established under section 3(a) and which are not in payment of a claim of the United States Government.

(b) DISTRIBUTION.—The Secretary of the Treasury—

(1) shall determine, in consultation with the Chairman of the United States Commission and the Secretary of State, the proportional distribution of the reimbursement set-aside provided for in subsection (a); and

(2) shall make an advance for credit, or reimburse, an Executive agency for its expenses in administering the Iraq claims program and this Act.

Amounts received by an Executive agency pursuant to paragraph (2) shall be credited or reimbursed to the appropriation account then current and shall remain available for expenditure without fiscal year limitation.

SEC. 6. PAYMENTS.

(a) IN GENERAL.—The United States Commission shall certify to the Secretary of the Treasury each award made pursuant to section 2. The Secretary of the Treasury shall make payment, out of the appropriate fund established pursuant to section 3(a) or 3(c), in the following order of priority to the extent funds are available in such fund:

(1) Payment of $10,000 or the principal amount of the award, whichever is less.

(2) For each claim that has priority under section 2(d), payment of a further $90,000 toward the unpaid balance of the principal amount of the award.

(3) Payments from time to time in ratable proportions on account of the unpaid balance of the principal amounts of all awards according to the proportions which the unpaid balance of such awards bear to the total amount in the appropriate claims fund that is available for distribution at the time such payments are made.

(4) After payment has been made of the principal amounts of all such awards, pro rata payments on account of accrued interest on such awards as bear interest.

(5) After payment has been made in full of all the awards payable out of a fund established pursuant to section 3(a) or 3(c), any funds remaining in that fund shall be transferred to the other claims fund created pursuant to section 3(a) or 3(c), except that any funds received by the United States from the United Nations Commission shall be so transferred only to the extent not inconsistent with requirements of the United Nations Commission.

(b) UNSATISFIED CLAIMS.—Payment of any award made pursuant to this Act shall not extinguish any unsatisfied claim, or be construed to have divested any claimant, or the United States on his or her behalf, of any rights against the Government of Iraq with respect to any unsatisfied claim.

SEC. 7. RECORDS.

(a) TRANSFER TO COMMISSION.—The head of any Executive agency may transfer or otherwise make available to the United States Commission such records and documents relating to claims authorized to be adjudicated

by this Act as may be required by the United States Commission in carrying out its functions under this Act.

(b) PUBLIC DISCLOSURE.—Section 552 of title 5 of the United States Code (commonly referred to as the "Freedom of Information Act") shall not apply with respect to records that, as determined by the Secretary of State, are required under the rules and decisions of the United Nations Commission to be withheld from public disclosure.

SEC. 8. STATUTE OF LIMITATIONS; DISPOSITION OF UNPAID CERTIFIED CLAIMS.

(a) STATUTE OF LIMITATIONS.—Any demand or claim for payment on account of an award that is certified under the Iraq claims program shall be barred one year after the publication date of the notice required by subsection (b).

(b) PUBLICATION OF NOTICE.—Nine years after the latter of—

(1) the last date on which the Secretary of the Treasury covers into any of the UN Commission Claims Funds, or into any fund described in section 3(b)(2), amounts allocated to that fund pursuant to section 3(b), or

(2) the last date on which the Secretary of the Treasury covers into the Iraq Claims Fund amounts allocated to that fund pursuant to section 3(d),

the Secretary shall publish a notice in the Federal Register detailing the statute of limitations provided for in subsection (a) and identifying the claim numbers and awardee names of unpaid certified claims.

(c) DISPOSITION OF UNPAID CERTIFIED CLAIMS.—Two years after the publication date of the notice required by subsection (b), any unpaid certified claim amount under the Iraq claims program, and any remaining balance in any of the UN Commission Claims Funds, in the Iraq Claims Fund, or in any fund referred to in section 3(b)(2) to the extent such balance reflects amounts deposited pursuant to that section, shall be deposited to the miscellaneous receipts of the Treasury.

SEC. 9. DEFINITIONS.

As used in this Act—

(1) the term "Government of Iraq" includes agencies, instrumentalities, and controlled entities (including public sector enterprises) of that government;

(2) the term "Executive agency" has the meaning given that term by section 105 of title 5, United States Code;

(3) the term "Iraq claims program" means the claims whose adjudication is provided for in this Act and any other claims that are within the jurisdiction of the United Nations Commission;

(4) the term "United Nations Commission" means the United Nations Compensation Commission established pursuant to United Nations Security Council Resolution 687 (1991); and

(5) the term "United States Commission" means the Foreign Claims Settlement Commission of the United States.

OPENING STATEMENT OF HON. LEE H. HAMILTON

Chairman HAMILTON. The Chair will just introduce it quickly and then call on Mr. Gilman for any comments he wants to make. I think members are familiar with the bill at this point. In the interest of a complete record, let me describe it very briefly.

It provides the necessary authority to establish, maintain and ultimately terminate a fair and orderly system for adjudicating the claims of U.S. nationals against Iraq. In other claims situations, the U.S. Government has not started the claim settlement process until it has reached a government-to-government settlement.

With Iraq, of course, there is no reasonable prospect of reaching such a settlement. For this reason, the United States needs the authority this bill provides to vest, and then use the proceeds from frozen Iraqi assets in the United States to provide awards to U.S. claimants.

Now, the bill is directed toward two goals. First, it sets up a system for dealing with the claims of U.S. nationals that predate the Gulf War through the U.S. Foreign Claims Settlement Commission, and secondly it sets up a structure for handling funds the United States may receive from the U.N. Commission.

The U.N. Commission is handling claims that result from Iraq's invasion and occupation of Kuwait. The legislation is necessary so that we can allow the U.N. Commission to do its job and so we can get this claims settlement process moving.

The Chair has an en bloc amendment to offer, but before I do that, I just wanted to say to members here a word of appreciation for their really extraordinary cooperation in moving a fairly difficult bill toward mark-up today.

As you call know, the report to accompany this bill will include language on many areas of concern to members. The committee report covers the committee's views on the ability of veterans to receive compensation for Persian Gulf Syndrome, Iraq's obligations to provide full compensation to all U.S. claimants, the jurisdiction of the U.N. Commission, the reimbursement of the U.S. contribution to the U.N. Commission, the extent to which the U.N. Commission should take into account U.S. contributions to Operation Desert Shield and Desert Storm, and contributions from Kuwait to the United States.

Now, the efforts of the committee members has been deeply appreciated by me. We've worked hard to develop the necessary language. I don't know that everything has been worked out, but much of it has.

The en bloc amendment which I offer right after Mr. Gilman makes his comments, results from that kind of a cooperative effort.

Mr. Gilman.

Mr. GILMAN. Mr. Chairman, I want to thank you for your efforts and the efforts of our staff in accommodating the requests from our members for hearings, and for additional briefings on this complex and very expensive legislation that incurs over billions of dollars out of our treasury.

While I'm in general agreement with the provisions in the bill, it's my understanding that there might be some lingering concerns about its impact on all claimants in light of the limited pool of funds that would be available.

In light of the important budgetary and policy implications of the legislation, Mr. Chairman, I believe that our committee and the House would be better served if we did not schedule this bill for consideration on the suspension calendar, but would open it up for full debate on the House floor.

Thank you, Mr. Chairman.

Chairman HAMILTON. Thank you, Mr. Gilman. I would be glad to visit with you about that proposal you made if we complete the legislation this morning, we will have to consider how it is brought up on the floor.

Mr. Bereuter wanted to make a statement. I think it would be appropriate now.

OPENING STATEMENT OF HON. DOUG BEREUTER

Mr. BEREUTER. Thank you very much, Mr. Chairman. I want to join Mr. Gilman in thanking you for the way that you have enabled this committee to conduct additional hearings to gain information.

I do, nevertheless, stand in opposition to H.R. 3221, and I would like to explain why. I do so only after carefully and thoroughly examining this complex issue because of the opportunity that we've had with the additional 2 weeks.

I oppose this legislation because I believe its passage will prohibit us from reversing an administration policy that adversely impacts U.S. commerce, U.S. exporters, and the future financing of international commercial transactions.

I do not rise in opposition to this legislation on technical, legal grounds involving a variety of letters of credit law. Rather I oppose this legislation on grounds of equity and policy. It seems only fair and equitable to this member that the U.S. Treasury Department should not prohibit U.S. exporters—and I want to stress this again—the U.S. Treasury should not prohibit U.S. exporters who have actually shipped goods to Iraq before the embargo from collecting payment owed to them by the Iraqis when the Iraqis authorized payment.

This was not the way Treasury treated exporters in similar circumstances with respect to frozen Iranian assets. They were paid, and they should have been paid.

In addition, I am concerned that current Treasury Department regulations will add substantial noncommercial costs to U.S. exporters in the future, and that is consistent with the testimony we heard on this committee—costs that are not born by our competitors.

The pool of claims from commercial sources that meet these criteria that I have specified are relatively small. Treasury should not be setting this unfortunate precedent.

I would like to say that I completely support one goal of this legislation to fully compensate those U.S. armed servicemen who bravely fought in the Persian Gulf War and were either killed or injured in that war, as well as the people injured on the U.S.S. *Stark*.

Unfortunately, the unprecedented step by the U.S. Department of Treasury to first compensate these servicemen out of a pool of frozen assets, some of which is owed to U.S. commercial interest, has created some very inequitable results.

I think it is important to recognize, despite the sensitivity of the matter, that such payment to servicemen who were not abused POW's from frozen enemy assets is, I am informed, a precedent-setting step. We have not done this before.

Our Government apparently failed to attain such reimbursement from Iraqi sources paid to the United Nation's controlled funds. I gather they made an effort, but we failed in the Security Council.

The U.S. Treasury Department could avoid the inequities locked in place by this legislation by reexamining its current regulations. It should do so.

It is this member's firm belief that a permanent policy should be developed which would permit both U.S. exporters and their financing institutions to understand and rely upon set rights and obligations when a Presidential freeze of foreign assets occurs.

This member attempted to develop a compromise amendment to this legislation which would more equitably distribute limited assets to all claimants, including U.S. armed servicemen, victims of the U.S.S. *Stark* incident, the U.S. Government, and all commercial claimants.

Unfortunately, it is clear that the fundamental source of the inequitable distribution of limited assets lies first in the Treasury Department regulations, and legitimate business claimants ultimately asked me not to offer such an amendment, or even a study amendment. They will, I surmise, take their chances in sustaining the Robb amendment.

That is, I think, unfortunate for the Congress if that prevails, but it certainly provides equity to some of the people who deserve equity.

Therefore, this member believes it would be appropriate for the Treasury Department to carefully reexamine its current regulations and attempt to resolve the numerous problems created by existing regulations.

In the meantime, I do not believe it is appropriate to approve this legislation, and I hope for reasons of equity as a message to Treasury to go back and do their job properly, my colleagues will also reject this legislation. If they approve it, then I join Mr. Gilman, the ranking member, in asking that the legislation not be placed on suspension calendar.

Thank you very much, Mr. Chairman.

Chairman HAMILTON. Well, I want to thank the gentleman from Nebraska for the cooperative way he has proceeded on this, and I appreciate his statement. I am well aware of the fact, of course, as other members are, that this is still an initial stage in the consideration of the bill. The Senate has not acted on it, and there will be opportunities to make adjustments in it beyond what we do this morning.

It is a very, very tough problem we're wrestling with, and the gentleman from Nebraska is a very conscientious and constructive member of the committee, so I respect his views and although I will support the bill, of course, I do not want to shut off opportunities to work with him to see if we can improve it as we move it along.

HAMILTON EN BLOC AMENDMENT

The Chair has an en bloc amendment at the desk. The Chief of Staff will report the amendment.

Mr. VAN DUSEN. Amendments offered en bloc by Mr. Hamilton. Page 2, line 23, after the period insert "or out of the 1987 attack on the U.S.S. *Stark.*"

Chairman HAMILTON. Without objection, further reading of the amendment is dispensed with, printed in the record in full, open for amendment.

[The en bloc amendment of Mr. Hamilton follows:]

AMENDMENTS OFFERED EN BLOC TO H.R. 3221 BY MR. HAMILTON

Page 2, line 23, before the period insert "or out of the 1987 attack on the U.S.S. Stark".

Page 4, line 14, after "President determines appropriate" insert "(subject to the limitation in the second sentence of this subsection)"; and at the end of line 17, add the following:

The amount allocated pursuant to this subsection for payment of claims of the United States Government may not exceed the amount which bears the same relation to the amount allocated to the Iraq Claims Fund pursuant to this subsection as the sum of all certified claims of the United States Government bears to the sum of all claims certified under section 2(b). As used in the preceding sentence, the term "certified claims of the United States Government" means those claims of the United States Government which are determined by the Secretary of State to be outside the jurisdiction of the United Nations Commission and which are determined to be valid, and whose amount has been certified, under such procedures as the President may establish.

Page 5, beginning in line 23, strike "shall make an advance for credit, or reimburse, an" and insert "to the extent provided in advance in Appropriations Acts, shall use amounts deducted pursuant to subsection (a) to reimburse, in accordance with the determination under paragraph (1), each"; page 6, line 2, strike "or reimbursed"; and line 3, after "and insert ", if so provided in an Appropriations Act,".

Chairman HAMILTON. The amendment addresses two concerns that have been expressed by members of the committee. The first relates to the U.S.S. *Stark* service personnel, and the second relates to the proportion of the frozen assets, Iraqi assets, that may be claimed by the U.S. Government.

The en bloc also amends section 5(b)(2) to eliminate possible Budget Act violations.

First, with regard to the U.S.S. *Stark* amendment, the U.S.S. *Stark* amendment simply adds members of the Armed Forces or other individuals with noncommercial claims arising from the 1987 U.S.S. *Stark* attack to those who receive priority treatment under this legislation.

Priority treatment means that after all eligible claimants receive up to $10,000, this group of individuals may receive an additional $90,000 before other claimants receive anything more.

All individuals in the priority group are compensated on a pro rata basis with all other claimants for any amount they are owed beyond this initial $100,000.

The second part of the en bloc amendment relates to the U.S. Government proportionality. The second amendment addresses this proportion of frozen Iraqi assets that may go to U.S. Government claims. The amendment codifies what is we understand to be the intent of the executive branch.

The amendment states that the President may not allocate from frozen Iraqi assets a proportionate amount to pay U.S. Government claims greater than the proportion of U.S. Government claims to total claims.

In other words, if the U.S. Government claims amount to one-third of the total claims against Iraq, the President cannot use more than one-third of the proceeds from vesting frozen assets to pay U.S. Government claims.

This amendment leaves open the possibility that the President may choose to use less than a proportionate amount to pay U.S. Government claims.

Is there further discussion of the amendment?

Mr. GILMAN. Mr. Chairman.

Chairman HAMILTON. Mr. Gilman.

Mr. GILMAN. Mr. Chairman, I would like to join you in supporting the en bloc amendment. I believe that its adoption would put all of our veterans on an equal footing and claiming benefits under the bill would provide some critically important guidelines to the administration in allocating claims among individuals, among companies, and the U.S. Government.

I understand too that it incorporates the amendment offered by myself and the chairman regarding compensation for the sailors on the U.S.S. *Stark*, and Mr. Leach's provision regarding the U.S. Government's claim on the frozen Iraqi assets.

Mr. Chairman, I am concerned, though, about a new provision that was added apparently in the last few days, and we saw it for the first time this morning, to take care of this so-called pay-as-you-go problem.

I think we need to be certain that this fix takes care of all of the budget policy implications involved, and Mr. Chairman, I would like to ask at this time if an administration witness could come forward to explain what they have done with this pay-as-you-go provision.

Chairman HAMILTON. OK, would the Treasury people come forward? Do we have anyone from the Treasury Department in the room?

STATEMENT OF MR. RONALD BETTAUER, ASSISTANT LEGAL ADVISER FOR CLAIMS, DEPARTMENT OF STATE

Mr. BETTAUER. Mr. Chairman, I'm Ronald Bettauer from the State Department.

Chairman HAMILTON. All right, sir.

Mr. BETTAUER. What we have done on the pay-as-you-go provision as it was in the bill was to consult carefully with OMB in advance, and their technical experts, and we have been assured that the version as the administration had earlier proposed it met pay-as-you-go requirements.

In the last few days, we understand that the CBO has raised a number of questions, and we were, as of the last day or two, in consultation with OMB and they with CBO to try to work out those provisions so that CBO's concerns would be alleviated, just as OMB's concerns have been.

I am somewhat concerned about the language proposed, because the language proposed would end up making any use of the de-

ducted amount subject to an appropriation bill, and that could delay the use of funds to run this claims program and get the money to the claimants, but obviously I think it is a technical matter that the CBO and OMB need to have in mind to get correct.

If they get it correct, obviously I think we can live with whatever those two agencies come up with.

Thank you, Mr. Chairman.

Mr. GILMAN. Mr. Chairman, if I might just further make an inquiry, then at this point we still have a questionable provision. Is that what you are telling us, until it is ironed out between OMB and CBO?

Mr. BETTAUER. Mr. Gilman, I think that the provision that is in the amendment, there is no question that it would meet the Budget Act requirements as far as I understand those requirements, because it says subject to appropriation.

OMB had told us that going that far had not been necessary, but I have no doubt that what Mr. Hamilton has proposed would be acceptable. What I had hoped that it would not be necessary to go that far.

If Mr. Hamilton decides, and CBO decides they need to have this amendment, we of course will live with their decision on that, but I do not think there is question about the acceptability of the new provision.

All I was suggesting is that should CBO find they could live with the prior provision, that would of course expedite the use of the assets for processing claims.

Chairman HAMILTON. All right.

Mr. GILMAN. Well, I am not so sure.

Chairman HAMILTON. If the gentleman would yield, I appreciate your raising the question, and this was something neither Mr. Gilman nor I knew anything about until just a few moments ago, but I think that if Mr. Gilman will work with me, in consultation with the OMB and the CBO, and the Department of State, we will work out language so that we have a formula that will not violate the Budget Act.

It's a fairly technical point.

Mr. GILMAN. I will be pleased to do that with you.

VOTE ON HAMILTON EN BLOC AMENDMENT

Chairman HAMILTON. All right, OK. Any further discussion on the amendment?

If not, the question is on the adoption of the en bloc amendment. All those in favor, signify by saying, "Aye."

Those opposed, "No." The ayes have it, and the amendment is agreed to.

GALLEGLY AMENDMENT

Mr. Gallegly has an amendment.

Mr. GALLEGLY. Thank you very much.

Chairman HAMILTON. And the Chief of Staff will report the amendment.

Mr. VAN DUSEN. Amendment offered by Mr. Gallegly. At the end of the bill, add the following: Section 10——

Chairman HAMILTON. Without objection, further reading of the amendment is dispensed with, printed in the record and open for amendment.

[The amendment of Mr. Gallegly follows:]

AMENDMENT TO H.R. 3221 OFFERED BY MR. GALLEGLY

At the end of the bill, add the following:

SEC. 10. ADMISSION TO THE UNITED STATES AS REFUGEES OF INDIVIDUALS WHO SERVED IN THE ARMED FORCES OF IRAQ DURING THE PERSIAN GULF CONFLICT.

(a) STATEMENT OF POLICY.—It is the sense of the Congress that individuals who have served in the armed forces of Iraq during the Persian Gulf conflict should not be admitted to the United States as refugees under the Immigration and Nationality Act until all claims certified under section 2(b) of this Act have been paid in full.

(b) PERSIAN GULF CONFLICT DEFINED.—For purpose of this section, the term "Persian Gulf conflict" means the period beginning on August 2, 1990, and ending on February 27, 1991.

Chairman HAMILTON. The Chair recognizes the gentleman from California.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Chairman HAMILTON. For 5 minutes.

Mr. GALLEGLY. My amendment seeks to prevent any individual who has served in the Armed Forces of Iraq during the Persian Gulf conflict from being admitted to the United States as a refugee under the Immigration and Nationality Act until all claims certified under this Act have been paid in full.

This would provide the time to closely review the current policy of our Government to resettle some 4,000 former Iraqi soldiers and their families in the United States. I believe it is an insult to the veterans of Desert Storm to welcome the Iraqis with open arms, while many veterans along with other Americans are facing the difficult economic times.

The cost to the taxpayers would be a minimum of $70 million to process these ex-soldiers of the Iraqi army. Why, of all people in the world who seek to immigrate to the United States, are we accepting 4,000 former enemy soldiers.

If these Iraqis do have legitimate fear of persecution if they return to their homeland, I would ask why won't Kuwait, Saudia Arabia or other Persian Gulf states take them in? After all, one would assume that the governments of these Gulf states are grateful to the United States for saving them from certain annexation into greater Iraq.

However, our Saudi friends have refused to even think about the possibility. I believe it is ludicrous. If the Israeli Government and the PLO can sit down together, surely the Gulf states' governments can set aside doctrinal differences and resettle their Arab brothers quickly.

The amendment would provide a delay in the current policy so we could get the answers to these questions.

I would also like to add, according to the CRS Report dated October 8 of this year, that many of the Iraqi ex-soldiers deserted the coalition only after the eventuality of Iraqi's military defeat became very obvious.

So I think to welcome them with open arms when just a short time ago they had taken up arms against our young men and women is not good policy, Mr. Chairman.

HAMILTON AMENDMENT TO THE GALLEGLY AMENDMENT

Chairman HAMILTON. The Chair has an amendment at the desk which the Chief of Staff will report.

Mr. VAN DUSEN. Amendment offered by Mr. Hamilton to the amendment offered by Mr. Gallegly. In line 9 of the section proposed——

Chairman HAMILTON. Without objection, further reading of the amendment is dispensed with, printed in the record in full.

[The amendment of Mr. Hamilton follows:]

AMENDMENT OFFERED BY MR. HAMILTON TO THE GALLEGLY AMENDMENT

In line 9 of the section proposed to be added by the Gallegly amendment, after "Nationality Act" insert "except in exceptional circumstances".

Chairman HAMILTON. First, let me just say that I think the gentleman from California has performed an important service here. He obviously has a good amendment. I think all of us can agree to the statement of policy, and he has been very cooperative in working with the Chair with respect to the amendment.

And I offer this amendment only to ensure, or try to ensure that the United States can fulfill its obligations to certain Iraqi soldiers, specifically a number of the Iraqis—and the number we think is somewhat under 500—left their military units inside Iraq before they were mobilized to go to the Kuwaiti front. Many of them participated in the rebellion against Saddam Hussein following the cease-fire.

There were other Iraqi soldiers who assisted the United States—for example, providing intelligence and that sort of thing to our forces either after defecting from the Iraqi Army, or after capture some assisted us, and so the lives of these individuals could be at risk.

The general proposition that the gentleman from California makes is a sound one, that we should not be admitting to the U.S. refugees under the Immigration and Nationality Act. This amendment says except in exceptional circumstances.

I have talked with the gentleman from California about it. We are quite prepared to put into the report language, a definition of exceptional circumstances that are acceptable to him, and we will work with him to do that so that it is narrowed from the broader phrase, exceptional circumstance.

The gentleman from California.

Mr. GALLEGLY. First of all, Mr. Chairman, I want to thank you for the cooperation you have extended in working out this amendment. I firmly believe we're trying to get to the same place, and one of the things that I want to avoid is penalizing as many as up to 500 Iraqi soldiers that provided exceptional service, intelligence service to our military during the course of the conflict.

I certainly don't have a problem with that, but the fact remains, we have already accepted 1,000-plus into the United States that may or may not have provided exceptional service. That's what I want to avoid, Mr. Chairman.

If you would agree that we tighten up the circumstances by which they would qualify for refugee status, i.e., exceptional intelligence to our military, then I would be very happy to accept the substitute.

Chairman HAMILTON. Well, I think that——

Mr. GALLEGLY. Or the extended——

Chairman HAMILTON. Let me assure you, we will work with you so that we get language that is acceptable to you, and I have no difference at all in intent from the gentleman, and I don't think he differs for me and the intent on it.

Mr. GALLEGLY. Not at all.

Chairman HAMILTON. Mr. Goodling.

Mr. GOODLING. I think both the amendment and the amendment to the amendment are good. I had a concern about those that we encouraged, as a matter of fact, to see if they couldn't overthrow Saddam Hussein, and they took us up on our encouragement, and so I think we do owe those people some protection.

Chairman HAMILTON. Yes. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. I too want to express support for the Gallegly amendment. There have been cases of legitimate refugees among those Iraqis being adjudicated—rebel fighters and a variety of ethnic groups who suffered under the Iraqi regime, among those with well-founded fear of persecution were they to return to Iraq.

This complicated issue is one which has been the subject of a great deal of discussion both with the State Department as well as with our Immigration Service. Accordingly I'm pleased to offer my support for the gentleman's largely technical amendment, and urge our colleagues to support the measure.

Thank you, Mr. Chairman.

Chairman HAMILTON. Mrs. Meyers.

Mrs. MEYERS. Thank you, Mr. Chairman. I believe this amendment, with the amendment to the amendment is good. I do have a question about how we are going to identify those people who provided exceptional service, and I hope that we don't open that door too wide.

I would also think that maybe we could make every effort to find sponsors for those Iraqis who have already been settled here so that they do not become public charges, because at this time, refugees usually have sponsors for, I think it is now 3 years, and there has been a suggestion made that it be extended to 5 years so that they cannot receive public benefits until that time.

I think this is a very positive thing. There is really no reason for us to accept enemy POW's as refugees unless they provided real and exceptional service to the coalition forces.

I think establishing some kind of a precedent that simply coming out of a bunker with your hands in the air is reasonable ground for refugee status is just a terrible precedent to set, and I'm very pleased that we are passing this.

Chairman HAMILTON. I thank the gentleman. Mr. Payne and then Mr. Diaz-Balart.

Mr. PAYNE. Mr. Chairman, I certainly support your amendment. As has been indicated by Mr. Goodling that we encouraged a rebellion against Saddam Hussein and it was done by some of the

forces, but we failed to support that effort, and so I think that these persons who acted in that manner should be allowed to have the status, so I support you, and the National Council of Churches and Church World Service and many other religious organizations in the country also support that position.

Thank you, Mr. Chairman.

Chairman HAMILTON. Mr. Diaz-Balart.

Mr. DIAZ-BALART. Thank you, Mr. Chairman. I have two questions. How many former Iraqi soldiers are we talking about? How many people are claiming that they are entitled to enter the United States? Does anybody know the answer to that?

Chairman HAMILTON. The Chair doesn't know the exact number. Can someone answer that? Let's hear from the administration. They can answer it better than I.

Mr. DIAZ-BALART. Thank you.

Chairman HAMILTON. Identify yourself please.

STATEMENT OF SUSAN JACOBS, BUREAU OF LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE

Ms. JACOBS. My name is Susan Jacobs and I work in the Bureau of Legislative Affairs. There are about 25——

Chairman HAMILTON. From which department?

Ms. JACOBS. The Department of State.

Chairman HAMILTON. All right.

Ms. JACOBS. There are about 25,000 people still in the camps in Saudi Arabia.

Mr. DIAZ-BALART. That claim that they have the right to enter the United States?

Ms. JACOBS. No, not——

Mr. DIAZ-BALART. Pursuant to a promise. My concern, Mr. Chairman, is what if anything was promised by the Government of the United States to people who now claim that pursuant to that promise of the Government of the United States, they have the right to enter the United States.

Ms. JACOBS. We never promised that they could enter the United States.

Mr. DIAZ-BALART. What was promised?

Ms. JACOBS. We promised some kind of assistance to them.

Mr. DIAZ-BALART. Some kind of assistance. There was a broadcast?

Ms. JACOBS. Yes.

Mr. DIAZ-BALART. That said we hereby promise some kind of assistance to you if you drop your weapons?

Ms. JACOBS. The assumption was that we would assist them in overthrowing Saddam Hussein.

Mr. GALLEGLY. Would the gentleman yield?

Mr. DIAZ-BALART. Sure.

Mr. GALLEGLY. Because I would like a followup question. When you say provide some type of assistance, would that mean perhaps encouraging our Arab friends in Saudi Arabia, Kuwait and so on, to take these folks in as refugees? By your words, would that qualify as helping?

Ms. JACOBS. That could, but we never made that kind of promise.

Mr. GALLEGLY. What kind of promise did you make?

Ms. JACOBS. We never promised refugee assistance. We didn't——

Mr. GALLEGLY. But you said we would help somehow.

Ms. JACOBS. Yes.

Mr. GALLEGLY. What would be——

Ms. JACOBS. Probably humanitarian assistance—resettlement somewhere.

Mr. GALLEGLY. But resettlement, would that mean encouraging other Arab states, for instance, do you think that would fulfill our responsibility as committed?

Ms. JACOBS. It would fulfill part of it.

Mr. DIAZ-BALART. Mr. Chairman, if I may followup.

Chairman HAMILTON. Sure.

Mr. DIAZ-BALART. So somehow this is to the troops that were on the frontline that were going to face our troops, obviously. We broadcasted to them, saying if you drop your arms, and if you don't fight us, we will provide some kind of assistance. Is that what we're talking about here?

Ms. JACOBS. Yes. There were, we dropped leaflets on them and made other, and made announcements. There were two forms of encouragement.

Mr. DIAZ-BALART. So like you say, it was some kind of assistance, we will help you in some way. It would be nice if you could provide us with a copy of what was dropped with a translation.

Ms. JACOBS. I have that in my office and I will be glad to provide that to you.

Mr. DIAZ-BALART. I would like that please, thank you.

Chairman HAMILTON. I think all of us are in agreement that we want it very tightly defined, the numbers that could come in, and we have to be very precise in our language. You and Mr. Gallegly raise a good point.

Mr. Gallegly.

Mr. GALLEGLY. Mr. Chairman, I don't want to belabor this because I think we're coming to a consensus, but the issue—there has been a discussion about at least 4,000 or more in the pipeline that are trying to get into the country right now under the asylum refugee requirements.

As Mr. Hamilton just said, he believes there may be as many as 400 or 500 who deserve refugee status. Maybe it is 300, maybe it's 520, but I certainly don't want to accept the fact that everyone that applies is going to be just allowed to come in because they say, "I no longer support Saddam Hussein."

And I think we are moving that direction.

Chairman HAMILTON. Absolutely, I agree. Mrs. Meyers.

Mrs. MEYERS. Yes, just a final question. I'm a little confused about this commitment that we made to people. It seems to me that the assistance we were offering them was to feed them and not to shoot them if they surrendered.

I mean, I would not presume that assistance would mean that we intended to pick them up and bring them to this country, and are you saying that you think they interpreted it that way?

Ms. JACOBS. No, I don't.

Mrs. MEYERS. OK. And what are we talking about in terms of time? Was this during that brief war? After the war? When were we doing this?

Ms. JACOBS. We did it before the end of the war, before the cease-fire.

Mr. GILMAN. Mr. Chairman.

Chairman HAMILTON. Mr. Gilman.

Mr. GILMAN. Ms. Jacobs, did we distribute leaflets over the enemy troops urging them to come over to our side?

Ms. JACOBS. Yes, we did, sir.

Mr. GILMAN. What did we state in those leaflets?

Ms. JACOBS. I have the leaflet at the office. I don't remember exactly what it says, but I will be very pleased to furnish it to the committee.

Mr. GILMAN. Can you just generally indicate what it was?

Ms. JACOBS. It was just we encourage you to surrender, this is how you do it, you know, come up with your hands up waving a white flag on your gun.

Mr. GILMAN. And as a result of those leaflets, some surrendered?

Ms. JACOBS. It was 100,000 people that came over to our side.

Mr. GILMAN. That was before the end of the war?

Ms. JACOBS. Yes, that is my understanding.

Mr. GILMAN. Was there anything specific put in the leaflet that promised them any relief if they came over to our side?

Ms. JACOBS. I will be very pleased to provide the leaflet. I have a copy of it. I don't remember exactly what it says.

Mr. GILMAN. Mr. Chairman, I would like to make a copy of the leaflet part of the record.

Chairman HAMILTON. Without objection, so ordered.

[The leaflet information appears in the appendix.]

Mr. Menendez.

Mr. MENENDEZ. Thank you, Mr. Chairman. I want to support Mr. Gallegly's amendment and commend him bringing it forth. I have the same concerns as he and Mr. Diaz-Balart have.

I hope that the courage of a few does not open the floodgates for many, and when I hear about this encouragement to surrender, I think it is an encouragement to spare your life and greater destruction upon your country, so I hope this has a very, very narrow focus, Mr. Chairman.

Chairman HAMILTON. Any further discussion on the amendment? All in favor of the amendment——

Mr. PAYNE. Mr. Chairman, just one point.

Chairman HAMILTON. Mr. Payne.

Mr. PAYNE. Yes. Could you clarify, wasn't there a leaflet that was sent—many of these are people from the South who were encouraged to take up arms against Saddam Hussein. These were not, there were a large number that were not frontline people. These were people who were there and actually took an aggressive attempt to overthrow Saddam Hussein.

Ms. JACOBS. You are correct, sir. Many of the people who defected from the Army later took part in the uprising against Saddam Hussein.

Mr. PAYNE. And they were——

Mr. JACOBS. Basically these were Caldians, Assyrian Christians, Shia in the South and Kurds in the North.

Mr. PAYNE. Right.

Ms. JACOBS. If there are any other questions, we would be very happy to furnish answers, and to work with the committee on defining exceptional circumstances.

Mr. PAYNE. Thank you.

VOTE ON HAMILTON AMENDMENT TO THE GALLEGLY AMENDMENT

Chairman HAMILTON. Any further discussion?

All right, all in favor of the amendment to Mr. Gallegly's amendment, signify by saying, "Aye."

Opposed, "No." The ayes have it. In the opinion of the Chair, the ayes have it. The amendment to the amendment is adopted.

VOTE ON GALLEGLY AMENDMENT AS AMENDED

The question now is on the amendment by the gentleman from California as amended. All in favor say, "Aye."

Chairman HAMILTON. Those opposed, "No." The ayes have it.

Mr. GALLEGLY. Mr. Chairman, could I respectfully request a recorded vote on that.

Chairman HAMILTON. The gentleman asks for a recorded vote. How many would favor a recorded vote, raise their hand?

A sufficient number. The Chief of Staff will call the roll.

Mr. VAN DUSEN. Chairman Hamilton.

Chairman HAMILTON. Aye.

Mr. VAN DUSEN. Mr. Gejdenson.

[No response.]

Mr. VAN DUSEN. Mr. Lantos.

[No response.]

Mr. VAN DUSEN. Mr. Torricelli.

[No response.]

Mr. VAN DUSEN. Mr. Berman.

[No response.]

Mr. VAN DUSEN. Mr. Ackerman.

[No response.]

Mr. VAN DUSEN. Mr. Johnston.

Mr. JOHNSTON. Aye.

Mr. VAN DUSEN. Mr. Engel.

[No response.]

Mr. VAN DUSEN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Aye.

Mr. VAN DUSEN. Mr. Oberstar.

Mr. OBERSTAR. Aye.

Mr. VAN DUSEN. Mr. Schumer.

[No response.]

Mr. VAN DUSEN. Mr. Martinez.

[No response.]

Mr. VAN DUSEN. Mr. Borski.

[No response.]

Mr. VAN DUSEN. Mr. Payne.

Mr. PAYNE. Aye.

Mr. VAN DUSEN. Mr. Andrews.

[No response.]

Mr. VAN DUSEN. Mr. Menendez.
Mr. MENENDEZ. Aye.
Mr. VAN DUSEN. Mr. Brown.
[No response.]
Mr. VAN DUSEN. Mr. McKinney.
Mr. MCKINNEY. Aye.
Mr. VAN DUSEN. Mr. Cantwell.
Mr. CANTWELL. Aye.
Mr. VAN DUSEN. Mr. Hastings.
Mr. HASTINGS. Aye.
Mr. VAN DUSEN. Mr. Fingerhut.
[No response.]
Mr. VAN DUSEN. Mr. Deutsch.
Mr. DEUTSCH. Aye.
Mr. VAN DUSEN. Mr. Wynn.
Mr. WYNN. Aye.
Mr. VAN DUSEN. Mr. Edwards.
[No response.]
Mr. VAN DUSEN. Mr. McCloskey.
[No response.]
Mr. VAN DUSEN. Mr. Sawyer.
Mr. SAWYER. Aye.
Mr. VAN DUSEN. Mr. Gilman.
Mr. GILMAN. Aye.
Mr. VAN DUSEN. Mr. Goodling.
Mr. GOODLING. Aye.
Mr. VAN DUSEN. Mr. Leach.
[No response.]
Mr. VAN DUSEN. Mr. Roth.
[No response.]
Mr. VAN DUSEN. Ms. Snowe.
Ms. SNOWE. Aye.
Mr. VAN DUSEN. Mr. Hyde.
[No response.]
Mr. VAN DUSEN. Mr. Bereuter.
Mr. BEREUTER. Aye.
Mr. VAN DUSEN. Mr. Smith.
Mr. SMITH. Aye.
Mr. VAN DUSEN. Mr. Burton.
[No response.]
Mr. VAN DUSEN. Ms. Meyers.
Mrs. MEYERS. Aye.
Mr. VAN DUSEN. Mr. Gallegly.
Mr. GALLEGLY. Aye.
Mr. VAN DUSEN. Ms. Ros-Lehtinen.
Ms. ROS-LEHTINEN. Aye.
Mr. VAN DUSEN. Mr. Ballenger.
Mr. BALLENGER. Aye.
Mr. VAN DUSEN. Mr. Rohrabacher.
Mr. ROHRABACHER. Aye.
Mr. VAN DUSEN. Mr. Levy.
Mr. LEVY. Aye.
Mr. VAN DUSEN. Mr. Manzullo.
Mr. MANZULLO. Aye.

Mr. VAN DUSEN. Mr. Diaz-Balart. Yes.
Mr. DIAZ-BALART. Yes.
Mr. VAN DUSEN. Mr. Royce.
[No response.]
Chairman HAMILTON. The Chief of Staff will announce the tally.
Mr. VAN DUSEN. Mr. Chairman, on this vote, there were 24 ayes, zero nays.
Chairman HAMILTON. And the amendment is adopted. Are there any other amendments, any further discussion on the bill? Mr. Rohrabacher.
Mr. ROHRABACHER. Just in passing, Mr. Chairman, does the bill make it a point that if we are in some way going to resume diplomatic relations with Iraq, that Iraq should be repaying the other debts that are outstanding? Is this something in the bill? I couldn't find that in the legislation?
Chairman HAMILTON. We have report language saying that they should pay.
Mr. ROHRABACHER. Does it tie that at all to the resumption of diplomatic relations?
Chairman HAMILTON. The language I'm quoting to you now in the draft report, Mr. Rohrabacher, is that the committee urges that prior to resuming diplomatic relations with the Government of Iraq, the President should consider whether the Government of Iraq has agreed to establish a mechanism for meeting the outstanding obligations, so it is a precondition.
Mr. ROHRABACHER. OK. Just for the record, I would like to state that before our Government assumes diplomatic relations with Iraq, all of the outstanding claims should be taken care of.

FINAL PASSAGE

Chairman HAMILTON. OK, thank you. Any further discussion. If not, the question occurs on ordering H.R. 3221, as amended, favorably reported. All those in favor, signify by saying, "Aye."
Those opposed, "No."
In the opinion of the Chair, the ayes have it.
Mr. GILMAN. Mr. Chairman.
Chairman HAMILTON. H.R. 3221, as amended, is order favorably reported. Mr. Gilman.
Mr. GILMAN. I request that the minority have the customary 3 days in order to file its views on these measures.
Chairman HAMILTON. Without objection, that request is granted.
Mr. GILMAN. Thank you, Mr. Chairman.
Chairman HAMILTON. We stand adjourned.
[Whereupon, at 11:07 a.m., the committee adjourned.]

APPENDIX

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

November 15, 1992

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed is the final report on United States Costs in the Persian Gulf Conflict and Foreign Contributions to Offset Such Costs, as required by Section 401 of P.L. 102-25. This report was prepared in consultation with the Secretary of Defense, the Secretary of State, the Secretary of the Treasury, and other appropriate government officials. Previous reports have covered the costs and contributions received for the period beginning August 1, 1990, and ending August 31, 1992.

In accord with the legal requirement, this report provides the following information:

- the incremental costs associated with Operation Desert Storm that were incurred during September 1992;

- the cumulative total of such costs, by fiscal year, from August 1, 1990, to September 30, 1992;

- the costs that are nonrecurring costs, offset by in-kind contributions, or offset by the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict;

- the allocation of costs among the military departments, the Defense Agencies of the Department of Defense, and the Office of the Secretary of Defense by category -- airlift, sealift, personnel, personnel support, operating support, fuel, procurement, and military construction; and

- the amount of contributions made to the United States by each foreign country. The report specifies the amount of cash payments pledged and received, provides a description and value of in-kind contributions pledged and received, and identifies restrictions on the use of such contributions.

Summaries of costs and contributions are included in the report as is a Department of Defense estimate of full incremental costs of the Persian Gulf conflict.

Respectfully submitted,

Richard Darman
Director

Enclosure

UNITED STATES COSTS IN THE PERSIAN GULF CONFLICT AND FOREIGN CONTRIBUTIONS TO OFFSET SUCH COSTS

Report #21: October 15, 1992

Section 401 of P.L. 102-25 requires a series of reports on incremental costs associated with Operation Desert Storm and on foreign contributions to offset such costs. This is the final report. Previous reports have covered the costs and contributions received for the period beginning August 1, 1990, and ending August 31, 1992.

Costs

The costs covered in this report are full incremental costs of Operation Desert Storm. These are additional costs resulting directly from the Persian Gulf crisis (i.e., costs that would not otherwise have been incurred). It should be noted that only a portion of full incremental costs have been included in Defense supplemental appropriations. These portions are costs that required financing in fiscal year 1991-1993 and that are exempt from statutory Defense budget ceilings. Not included in fiscal year 1991-1993 appropriations are items of full incremental costs such as August-September 1990 costs and costs covered by in-kind contributions from allies.

The Department of Defense has estimated the full incremental cost of the Persian Gulf conflict to be $61.1 billion. Costs reported by the field to the Department of Defense through September 30, 1992, are summarized in Table 1. The cost information is shown by the cost and financing categories specified in Section 401 of P.L. 102-25. Tables 2-9 provide more detailed information by cost category.

The costs shown in Tables 1-9 include an estimate of the cost of equipment repair, rehabilitation, and maintenance caused by the high operating rates and combat use. They also include most of the costs of phasedown of operations and the return home of the deployed forces. However, incremental costs are being and will continue to be incurred in subsequent months. These include long-term benefit and disability costs, and the costs of continuing operations in the region. Over 25,000 military personnel were in the region at the end of September. Combat aircraft continue to fly in the region and the U.S. forces will continue to remain in the region until all parties are satisfied with long term security arrangements. A Department of Defense estimate of potential total incremental costs by major category of expense is attached.

Incremental Coast Guard costs in support of military operations in the Persian Gulf were $33.4 million.

Incremental Department of Education costs to date have been $18.9 million. Incremental Department of Veterans Affairs costs to date have been $253.3 million.

Contributions

Section 401 of P.L. 102-25 requires that this report include the amount of each country's contribution during the period covered by the report, as well as the cumulative total of such contributions. Cash and in-kind contributions pledged and received are to be specified. All commitments have been fulfilled and no further contributions are expected.

Tables 10 and 11 list foreign contributions pledged in 1990 and 1991, respectively, and amounts received. Cash and in-kind contributions are separately specified.

Foreign countries contributed $9.6 billion of the $9.7 billion pledged in calendar year 1990, and $44.2 billion of the $44.3 billion pledged in calendar year 1991. The difference between contributions and pledges is due to in-kind assistance which had been made available, but could not be utilized. Of the total $53.8 billion received, $48.1 billion was in cash and $5.7 billion was in-kind assistance (including food, fuel, water, building materials, transportation, and support equipment). Table 12 provides further details on in-kind contributions. Table 13 summarizes the final status of commitments and contributions received.

List of Tables

Table 1

SUMMARY 1/

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
(1) Airlift	412	2,631	156	20	177	3,219
(2) Sealift	235	4,313	446	48	494	5,042
(3) Personnel	223	5,247	2,277	94	2,371	7,841
(4) Personnel Support	352	6,261	144	48	192	6,805
(5) Operating Support	1,210	14,439	4,360	86	4,446	20,095
(6) Fuel	626	3,922	223	9	232	4,780
(7) Procurement	129	8,255	28	1	29	8,413
(8) Military Construction	11	340				351
Total	3,197	45,409	7,634	307	7,941	56,546 2/

Nonrecurring costs included above 3/	201	13,438	419	53	472	14,111
Costs offset by:						
In-kind contributions	225	5,251	183		183	5,659
Realignment 4/	913	119	224	2	232	1,264

1/ Data was compiled by OMB. Source of data -- Department of Defense. This report adjusts earlier estimates to reflect more complete accounting information.

2/ This report includes the costs of equipment repair, rehabilitation, and maintenance caused by the high operating rates and combat use. The report also includes most of the costs of phasedown of operations and the return home of the deployed forces. However, certain long-term benefit and disability costs have not been reflected.

3/ Nonrecurring costs include investment costs associated with procurement and Military Construction, as well as other one-time costs such as the activation of the Ready Reserve Force ships.

4/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

Table 2

AIRLIFT

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Airlift						
Army	207	1,126	47	6	53	1,386
Navy	85	881	56	2	57	1,024
Air Force	114	596	53	13	66	776
Intelligence Agencies		1				1
Special Operations Command	6	28	0		0 1/	34
Total	412	2,631	156	20	177	3,219
Nonrecurring costs included above		1,050	47	6	53	1,103
Costs offset by:						
In-kind contributions	7	94	0		0 1/	101
Realignment 2/	6					6

1/ Costs are less than $500 thousand.
2/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes costs related to the transportation by air of personnel, equipment and supplies.

During this period 49 missions were flown, transporting 1,180 short tons of cargo and 4,050 passengers to and from the Gulf region.

Table 3

SEALIFT

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Sealift						
Army	123	3,430	388	40	428	3,981
Navy	99	497	28	1	29	625
Air Force	12	370	30	7	37	419
Defense Logistics Agency		14				14
Special Operations Command	2	2				4
Total	235	4,313	446	48	494	5,042

Nonrecurring costs included above	57	1,352	151	16	167	1,576
Costs offset by:						
In-kind contributions	2	151	12		12	165
Realignment 1/	2					2

1/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes costs related to the transportation by sea of personnel, equipment and supplies

Redeployment of all heavy equipment and supplies from the Gulf region was completed in May. Costs for this period include billings for previous shipments, as well as current operations.

Table 4

PERSONNEL

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Personnel						
Army	126	3,122	1,643	88	1,731	4,979
Navy	22	1,199	273	5	278	1,500
Air Force	75	926	360	2	362	1,363
Total	223	5,247	2,277	94	2,371	7,841

Nonrecurring costs included above		45				45
Costs offset by:						
In-kind contributions						
Realignment 1/	15			2	2	18

1/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes pay and allowances of members of the reserve components of the Armed Forces called or ordered to active duty and the increased pay and allowances of members of the regular components of the Armed Forces incurred because of deployment in connection with Operation Desert Storm.

The October-August estimate has been increased by $1.1 billion to reflect military personnel separation costs.

At the end of September over 25,000 people were in theater.

Table 5

PERSONNEL SUPPORT

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992				Total
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total		
Personnel Support							
Army	209	4,822	199	32	231		5,262
Navy	104	889	-15	6	-8	1/	985
Air Force	24	498	-117	10	-106	1/	415
Intelligence Agencies	2	10	0		0	2/	12
Defense Logistics Agency	12	18	1		1		30
Defense Mapping Agency		6					6
Special Operations Command	2	9	1	0 2/	1		12
Office of the Secretary of Defense		10					10
Defense Health Program			74		74		74
Total	352	6,261	144	48	192		6,805

Nonrecurring costs included above	4	1,428	173	30	204	1,636
Costs offset by:						
In-kind contributions	28	1,665	17		17	1,709
Realignment 3/	3	6		2	2	10

1/ Some previously reported medical costs have been reallocated to the Defense Health Program to reflect the new funding responsibilities for that program.

2/ Costs are less than $500 thousand.

3/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes subsistence, uniforms and medical costs.

Most of the reported costs for this period were for Reserve deactivation and medical support.

Table 6

OPERATING SUPPORT

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Operating Support						
Army	896	8,051	2,786	15	2,800	11,747
Navy	223	3,801	1,038	15	1,052	5,076
Air Force	68	2,487	530	56	586	3,141
Intelligence Agencies		1				1
Special Operations Command	15	44	7	1	7	66
Defense Communications Agency		1				1
Defense Mapping Agency	8	49				57
Defense Nuclear Agency		3				3
Office of the Secretary of Defense		3				3
Total	1,210	14,439	4,360	86	4,446	20,095

Nonrecurring costs included above		968				968
Costs offset by:						
In-kind contributions	167	1,631	18		18	1,815
Realignment 1/	698	63	224	4	228	989

1/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes equipment support costs, costs associated with increased operational tempo, spare parts, stock fund purchases, communications, and equipment maintenance.

FY 1991 costs have been reduced by $1.1 billion due to a reestimate of Defense stock fund costs

The October-August estimate has been reduced by $150 million due to a reestimate of Air Force in-country costs and Defense stock fund costs.

Costs reported for this period reflect continuing operations in the region.

Table 7

FUEL

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Fuel						
Army	10	197	16		16	224
Navy	19	1,234	88	2	90	1,342
Air Force	137	2,477	118	8	125	2,739
Special Operations Command		14	1	0 1/	1	15
Defense Logistics Agency	460					460
Total	626	3,922	223	9	232	4,780
Nonrecurring costs included above						
Costs offset by:						
In-kind contributions	21	1,290	136		136	1,447
Realignment 2/	60	1				61

1/ Costs are less than $500 thousand.
2/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes the additional fuel required for higher operating tempo and for airlift and sealift transportation of personnel and equipment as well as for the higher prices for fuel during FY 1991.

The October-August estimate has been reduced by $45 million to delete an erroneous charge.

The costs reported during this period were for incremental fuel costs.

Table 8

PROCUREMENT

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Procurement						
Army	49	2,371	6	1	7	2,426
Navy	47	2,415				2,462
Air Force	32	3,332				3,364
Intelligence Agencies	1	12				12
Defense Communications Agency		0 1/				0 1/
Special Operations Command		99				99
Defense Logistics Agency		4				4
Defense Mapping Agency		1				1
Defense Nuclear Agency		0 1/				0 1/
Defense Systems Project Office		1				1
Office of the Secretary of Defense		21				21
Def. Adv. Res. Projects Agency			22		22	22
Total	129	8,255	28	1	29	8,413

Nonrecurring costs included above	129	8,255	48	1	49	8,433
Costs offset by:						
In-kind contributions		84				84
Realignment 2/	119	48				166

1/ Costs are less than $500 thousand.

2/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes ammunition, weapon systems improvements and upgrades, and equipment purchases.

Costs reported during this period were for evaluation of captured equipment.

Table 9

MILITARY CONSTRUCTION

INCREMENTAL COSTS ASSOCIATED WITH OPERATION DESERT STORM
Incurred by the Department of Defense
From August 1, 1990 Through September 30, 1992
($ in millions)

	FY 1990	FY 1991	FY 1992			
	Aug-Sep	Oct-Sep	Oct-Aug	September	Total	Total
Military Construction						
Army	7	339				346
Navy						
Air Force	4	2				5
Total	11	340				351

Nonrecurring costs included above	11	340				351
Costs offset by:						
In-kind contributions		338				338
Realignment 1/	11	2				12

1/ This includes the realignment, reprogramming, or transfer of funds appropriated for activities unrelated to the Persian Gulf conflict.

This category includes the cost of constructing temporary billets for troops, and administrative and supply and maintenance facilities.

No costs were reported during this period.

Table 10

FINAL REPORT OF
FOREIGN CONTRIBUTIONS PLEDGED IN 1990 TO OFFSET U.S. COSTS 1/
($ In millions)

	Commitments			Receipts			Future
	Cash	In-kind	Total	Cash	In-kind	Total	Receipts
GCC STATES	5,827	1,018	6,845	5,798	1,048	6,845	
SAUDI ARABIA	2,457	882	3,339	2,428	912	3,339	
KUWAIT	2,500	6	2,506	2,500	6	2,506	
UAE	870	130	1,000	870	130	1,000	
GERMANY 2/ 3/	272	800	1,072	272	683	955	
JAPAN 2/	1,084	596	1,680	1,134	546	1,680	
KOREA	50	30	80	50	30	80	
BAHRAIN		1	1		1	1	
OMAN/QATAR		1	1		1	1	
DENMARK		1	1		1	1	
TOTAL	7,233	2,447	9,680	7,254	2,309	9,563	

1/ Data was compiled by OMB. Sources of data: commitments -- Defense, State, and Treasury; cash received -- Treasury; receipts and value of in-kind assistance -- Defense.

2/ 1990 cash contributions were for transportation and associated costs.

3/ The commitment has been fulfilled. Germany made available for donation to the U.S. over $200 million worth of ammunition, which the U.S. chose not to accept due to the termination of the war.

Table 11

FINAL REPORT OF
FOREIGN CONTRIBUTIONS PLEDGED IN 1991 TO OFFSET U.S. COSTS 1/
($ in millions)

	Commitments			Receipts			Future
	Cash	In-kind	Total	Cash	In-kind	Total	Receipts
GCC STATES	26,896	3,242	30,138	26,896	3,260	30,156	
SAUDI ARABIA	10,381	3,119	13,500	10,381	3,134	13,515	
KUWAIT	13,515	35	13,550	13,515	38	13,553	
UAE	3,000	88	3,088	3,000	88	3,088	
GERMANY	5,500		5,500	5,500		5,500	
JAPAN 2/	8,332		8,332	8,332		8,332	
KOREA 3/	100	175	275	100	71	171	
DENMARK		11	11		11	11	
LUXEMBOURG		6	6		6	6	
OTHER	7	2	9	8	2	10	
TOTAL	40,836	3,436	44,271	40,836	3,350	44,186	

1/ Data was compiled by OMB. Sources of data: commitments — Defense, State, and Treasury; cash received -- Treasury; receipts and value of in-kind assistance — Defense.

2/ 1991 cash contributions are for logistics and related support.

3/ The commitment has been fulfilled and there are no future receipts against this commitment. The total commitment could not be fully utilized by the U.S. for Desert Shield/Desert Storm requirements. Korea has provided in-kind support for non-Desert Shield/Desert Storm projects in FY 1992 in an amount equivalent to the difference.

Table 12

DESCRIPTION OF IN-KIND ASSISTANCE RECEIVED
TO OFFSET U.S. COSTS
($ in millions)

	Calendar Year 1990 Commitments	Calendar Year 1991 Commitments
SAUDI ARABIA Host nation support including food, fuel, housing, building materials, transportation and port handling services.	912	3,134
KUWAIT Transportation	6	38
UNITED ARAB EMIRATES Fuel, food and water, security services, construction equipment and civilian labor.	130	88
GERMANY Vehicles including cargo trucks, water trailers, buses and ambulances; generators; radios; portable showers; protective masks, and chemical sensing vehicles	683	
JAPAN Construction and engineering support, vehicles, electronic data processing, telephone services, medical equipment, and transportation.	546	
KOREA Transportation and replenishment stocks	30	71
BAHRAIN Medical supplies, food and water	1	
OMAN/QATAR Oil, telephones, food and water	1	
DENMARK Transportation	1	11
LUXEMBOURG Transportation		6
OTHER Transportation		2
TOTAL	2,309	3,350

Table 13

FINAL REPORT OF
FOREIGN CONTRIBUTIONS PLEDGED IN 1990 AND 1991 TO OFFSET U.S. COSTS
COMMITMENTS AND RECEIPTS 1/
($ in millions)

	Commitments			Receipts			Future Receipts
	1990	1991	Total	Cash	In-kind	Total	
GCC STATES	6,845	30,138	36,983	32,694	4,307	37,001	
SAUDI ARABIA	3,339	13,500	16,839	12,809	4,046	16,854	
KUWAIT	2,506	13,550	16,056	16,015	44	16,059	
UAE	1,000	3,088	4,088	3,870	218	4,088	
GERMANY 2/	1,072	5,500	6,572	5,772	683	6,455	
JAPAN	1,680	8,332	10,012	9,466	546	10,012	
KOREA 3/	80	275	355	150	101	251	
OTHER	3	26	29	8	22	30	
TOTAL	9,680	44,271	53,951	48,090	5,659	53,749	

1/ Data was compiled by OMB. Sources of data: commitments — Defense, State, and Treasury; cash received -- Treasury; receipts and value of in-kind assistance -- Defense.

2/ The commitment has been fulfilled. Germany made available for donation to the U.S. over $200 million worth of ammunition, which the U.S. chose not to accept due to the termination of the war.

3/ The commitment has been fulfilled and there are no future receipts against this commitment. The total commitment could not be fully utilized by the U.S. for Desert Shield/Desert Storm requirements. Korea has provided in-kind support for non-Desert Shield/Desert Storm projects in FY 1992 in an amount equivalent to the difference.

ATTACHMENT

Department of Defense Estimate of Full Incremental Desert Shield/Desert Storm Costs ($ in Billions)

	Reported 1 August 1990 30 September 1992	DOD Estimate of Additional Costs *	Total Estimated Costs
Airlift	3.2	.1	3.3
Sealift	5.0	-	5.0
Personnel	7.8	.2	8.0
Personnel Support	6.8	.1	6.9
Operating Support	20.1	.5	20.6
Fuel	4.8	.1	4.9
Investment	8.4	-	8.4
Military Construction	.4	-	.4
Other Costs**	.3	3.3	3.6
Total	**56.8**	**4.3**	**61.1**

The estimate of future costs for DOD reflects continuing operations in the Persian Gulf Region.

- o Over 25,000 military personnel were in the region at the end of September.
- o Combat aircraft continue to fly in the region and U.S. forces will continue to remain in the region until all parties are satisfied with long term security arrangements.

* No additional appropriations are required.

** This includes personnel benefit costs that have already been incurred by the Department of Veterans Affairs and the Department of Education. Also included are Coast Guard costs and the present value of long term personnel benefits.

The following materials summarize current information and estimates of probable claims against Iraq. The first list summarizes claims based on Iraq's invasion and occupation of Kuwait, which have been or will be submitted to the UN Compensation Commission. The second list summarizes the same category of claims for all governments and their nationals. The third list summarizes the results of a U.S. Treasury Department survey in early 1991 of Americans with claims against Iraq up to January 15, 1991. This list includes both pre-war claims and claims relating to the Iraqi invasion up to that date.

CATEGORIES OF UNITED NATIONS COMPENSATION COMMISSION CLAIMS

Claims may be submitted to the United Nations Compensation Commission in the following six categories:

Category A---Claims by individuals for fixed amounts for losses arising from departure from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991, as a result of Iraq's unlawful invasion and occupation of Kuwait.

Category B---Claims by individuals for fixed amounts for serious personal injury or the death of a spouse, child or parent as a result of Iraq's 2 August 1990 unlawful invasion and subsequent occupation of Kuwait.

Category C---Claims by individuals for damages of any type up to $100,000, sustained as a result of Iraq's 2 August 1990 unlawful invasion and subsequent occupation of Kuwait.

Category D---Claims by individuals for damages of any type in excess of $100,000, sustained as a result of Iraq's 2 August 1990 unlawful invasion and subsequent occupation of Kuwait.

Category E---Claims by corporations, other private legal entities and public-sector enterprises for damages sustained as a result of Iraq's 2 August 1990 unlawful invasion and subsequent occupation of Kuwait.

Category F---Claims by governments and international organizations for damages sustained as a result of Iraq's 2 August 1990 unlawful invasion and subsequent occupation of Kuwait.

LIST 1

TOTAL NUMBER OF CLAIMS SUBMITTED TO THE UNITED NATIONS COMPENSATION COMMISSION BY THE U.S. GOVERNMENT AS OF 13 OCTOBER 1993

CATEGORY	NUMBER FILED	ASSERTED VALUE (US$) (Estimated)
A	649 claims	$ 2,959,000
B	54 claims	$ 145,000
C	1993 claims	$93,598,000
D	100 claims	$18,238,000
TOTAL	2,796 claims	$114,940,000

ESTIMATED TOTAL NUMBER OF CLAIMS[1] REMAINING TO BE SUBMITTED TO THE UNITED NATIONS COMPENSATION COMMISSION BY THE U.S. GOVERNMENT AS OF 13 OCTOBER 1993

CATEGORY	NUMBER TO BE FILED (Estimated)	ASSERTED VALUE (US$) (Estimated)
A,B,C	De Minimis	De Minimis
D	270 claims	$ 49,243,000
E	165 claims	$924,400,000
F	12 claims	$115,000,000
TOTAL	447 claims	$1,088,643,000

ESTIMATED FINAL TOTAL OF CLAIMS TO BE SUBMITTED TO THE UNITED NATIONS COMPENSATION COMMISSION BY THE U.S. GOVERNMENT IN ALL CATEGORIES

FINAL TOTAL (Estimated)	TOTAL ASSERTED VALUE (US$) (Estimated)
3,243 claims	$1,203,583,000

[1] It has yet to be determined whether certain of the remaining claims meet the UNCC's criteria for submission.

LIST 2

TOTAL NUMBER OF CLAIMS SUBMITTED WORLDWIDE TO THE UNITED NATIONS COMPENSATION COMMISSION AS OF 24 SEPTEMBER 1993

CATEGORY	NUMBER FILED	ASSERTED VALUE (US$)
A	785,956	2,639,000,000
B	3,051	9,012,000
C	226,960	6,247,000,000
D	2,704	758,000,000
E	697	5,000,000,000
F	5	300,000,000
TOTAL	1,019,373	14,953,012,000

TOTAL NUMBER OF CLAIMS EXPECTED TO BE RECEIVED BY THE UNITED NATIONS COMPENSATION COMMISSION (By 1 January 1994)

CATEGORY	NUMBER TO BE FILED (Estimated)	ASSERTED VALUE (US$) (Estimated)
A	941,504	3,366,509,785
B	4,559	13,296,669
C*	438,286	13,649,288,845
D	10,000	Estimates unavailable
E	4,000	70,000,000,000
F	200	30,000,000,000
TOTAL	1,398,549	Over 117,029,095,299

*not including a consolidated claim of 1.24 million workers from Egypt

LIST 3

U.S. Claims Against Iraq as of January 15, 1991
(in millions)

These estimates are based on a census of unadjudicated claims conducted by the Treasury Department in early 1991, immediately prior to the Desert Storm campaign. These estimates do not include claims arising after the beginning of Desert Storm hostilities on January 16, 1991.

	Pre-8/2/90[1] Claims	Post-8/2/90 Claims
Claims by Individuals[2]		944.2
Claims by Businesses[3]	829.3	1,280.2
Claims by U.S. Government[4]	2,177.1	50.2
Claims by Banks[5]	114.5	
Totals:	$3,119.9	$2,274.6
Grand Total:		$ 5,394.5

[1] Date of Iraqi invasion of Kuwait.

[2] Includes claims for expropriation of personal property, salaries & benefits, personal injury, and other damages.

[3] Includes claims for expropriation of property and equity, overdue loans and credits, receivables, and breach of contract.

[4] Includes CCC claims, EXIM bank claims, damages to the USS Stark, and other damages.

[5] Includes direct loans, syndicated loans, and other credits.

POTENTIAL CLAIMS OF DEPARTMENT OF DEFENSE MILITARY AND CIVILIAN PERSONNEL ARISING OUT OF IRAQ'S INVASION AND OCCUPATION OF KUWAIT

Evacuation Claims: All personnel and their dependents evacuated from Kuwait or Iraq after 2 August 1990.

Army: 7 claims filed, total: $208,000, of which $20,666 were paid.
15 claims not yet paid, or expected to be filed.
Navy: 36 claims filed, or expected to be filed, valued at $32,357.40.
Air Force: 2 property claims valued at $105,000.

Desert Shield claims:

a. Military personnel killed while deployed in the area of operations prior to Desert Storm, while deploying from CONUS as part of Desert Shield or while directly supporting the deployment.

Army: 21
Navy: 36
Air Force: 22

b. Civilian personnel killed while deployed, deploying, or directly supporting the deployment.

Army, Navy and Air Force: none

c. Military personnel seriously injured while deployed, deploying or in direct support of the deployment.

Army: 4
Navy: 156
Air Force: 3

d. Civilian personnel who sustained serious injury while deployed, deploying or in direct support of the deployment.

Army, Navy and Air Force: unknown

Desert Storm Claims:

a. Killed in action. (Includes accidental deaths occurring from combat operations.)

Army: 98
Navy: 30
Air Force: 24

b. Wounded in action.

Army: 354
Navy: 97
Air Force: 1

c. Prisoners of war, and claims not otherwise covered in other categories.

Army: 5
Navy: 8
Air Force: 8

d. Accidental deaths and serious injuries sustained during the period of Desert Storm, using the categories under Desert Shield claims above.

Army: unknown
Navy: deaths: 49
injured: 918
Air Force: deaths: 2
injured: 8

<u>Occupation and Recovery</u>:

a. Military personnel killed during the occupation of southern Iraq and the ongoing recovery operations in Kuwait.

Army: 106
Navy: 5
Air Force: none

b. Military personnel sustaining serious injury during occupation and recovery operations.

Army: 282
Navy: 288
Air Force: none

c. The number of civilian employees killed during occupation and recovery operations.

Army: 3
Navy and Air Force: none

d. Serious civilian injuries during the occupation and recovery operations.

<u>Miscellaneous</u>. Damage to or loss of personal property by military and civilian personnel and their dependents under Desert Shield, Desert Storm and Occupation and Recovery.

Army: unknown
Navy: unknown
Air Force: Desert Shield: 580 claims for $52,898.93
Desert Storm: 122 claims for $21,407.92
Occupation and Recovery: 8 claims for $755.96

Precedent for Payment of Claims of U.S. Military Personnel Against Foreign Governments

On May 17, 1987, the Stark was attacked by Iraqi aircraft in the Persian Gulf. On April 4, 1988, the United States presented wrongful death claims regarding compensation for the 37 crewmen who were killed. On March 29, 1989, the United States and Iraq settled these claims for $27,350,370. Iraq paid on April 14, 1989, and all the funds were allocated to the beneficiaries. The United States presented claims on behalf of the injured crewmen and for U.S. Government losses, including damage to the ship, on May 19, 1989. These claims have not been paid.

In 1967, Israel attacked the Liberty. Thirty-four seamen were killed. The United States made wrongful death claims against Israel and recovered $3,323,500.

In the early 1950's, amendments to the War Claims Act were enacted directing that U.S. servicemen held as prisoners of war be compensated for maltreatment by the enemy while in captivity out of liquidated German and Japanese assets in the United States.

* * *

The current situation is unique. Binding Security Council Resolution 687 (1991) decided in paragraph 16 that "Iraq . . . is liable under international law for any direct loss, damage . . . or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". This establishes Iraq's liability in this case for the death and injury claims of U.S. military personnel involved in the Persian Gulf conflict.

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Statement of Anthony Lewis
President, Klein-Berger Company
Before the House Committee on Foreign Affairs
Hearing on the Iraq Claims Settlement Act

October 13, 1993

Mr. Chairman, thank you for this opportunity to share my concerns with the committee over the administration of the Iraq asset freeze. I am a U.S. citizen, a businessman and a Gulf War veteran. I am outraged by the treatment my company has received from the Treasury Department's Office of Foreign Assets Control (OFAC) and I urge your committee to take action on this issue.

First, let me assure you that I have no sympathy for Saddam Hussein and no quarrel with the President's authority to freeze Iraqi assets. As a Colonel in the Air National Guard, I spent ten months with Operation Desert Shield and Desert Storm flying combat refueling missions over Iraq. I flew 37 missions including the first sortie of the war when Desert Shield turned in to Desert Storm. We flew at low altitude to avoid radar. Later on I took part of a SAM in a wing. Again, no one supports sanctions against the Iraqi government more than I do.

Now that my service is over, I have resumed my career with Klein-Berger Company as President. My company is a major export trader, packager and processor of specialty North American agricultural commodities including pulses (dry edible beans, peas and lentils), dried fruits and nuts and olive oil. Our headquarters is in San Francisco.

My war service took on an ironic twist when I returned home to find my company in financial difficulty because of OFAC's administration of the Iraqi asset freeze. Klein-Berger had shipped $2 million worth of peas prior to Iraq's invasion of Kuwait and the imposition of the freeze. The U.S. bank holding the funds said they could not make payment because of the Presidential order. We have asked OFAC for help with this matter, and despite their legal ability to solve the problem posed by "our truly unique situation" as Mr. Newcomb put it, they have turned us down.

From January 1987 to July 1990, Klein-Berger sold a number of agricultural product cargoes to the government of Iraq. In January 1990, Klein-Berger learned that the Iraqis wanted to buy yellow split peas from three sources: the U.S., Canada and Australia. Klein-Berger has operations in Canada and Australia. The company bid on, and won, contracts from all three sources.

The first shipment was U.S. origin and was shipped and paid for without incident. The second contract, for Canadian peas, was shipped in two parts. The first shipment left Canada in April of 1990 and the $2 million payment was received in May. The entire Canadian sale was done with an irrevocable letter of credit issued by an Iraqi bank (owned by the government of Iraq). The Royal Bank of Canada was the advising bank and the Bank of New York was the reimbursing bank.

We allowed the second vessel to leave Canada after confirmation that the Iraqi funds were on deposit in New York, and the shipment arrived in late June. Klein-Berger presented and negotiated all necessary papers for payment. The goods were accepted without incident, and the Iraqi bank accepted the shipping documents under the irrevocable letter of credit prior to the embargo and sanctions. However, the telex instructions to release the funds from the Bank of New York did not arrive in New York until fourteen banking days after the sanctions were imposed.

The Iraqis have no claims against this money. We have telex's from them saying this. Allowing the U.S. government to hold on to this money will not punish Iraq. It will punish an American company.

Last December, in a case with a related fact pattern, U.S. District Court Judge Stanley Sporkin found that once that contract was performed, ownership of the funds passed from the Iraqis to the American company. We believe this reasoning should be followed for all similarly situated companies. Our money should not be caught up in the asset freeze.

Prior to losing the above court case, OFAC turned down three license requests from us for payment. They said that since our letter of credit was "merely advised" not "confirmed" we didn't deserve payment. This is a new requirement after the fact. There was no need for confirmed letters of credit (where the bank assumes the obligation to pay). First, we had been doing business with the Iraqis for several years and they had a good credit record with us. We had just received a $2 million payment from them the month before. Second, we always verified that they had sufficient funds in their account before we shipped the goods. Third, we were selling them peas. This is not a high margin product. Any additional business costs, like paying banks for confirming letters of credit, would not have been affordable; neither would they have been warranted given our business experiences with Iraq.

I am concerned that the committee is working on legislation to distribute Iraqi assets before the question of how to segregate the assets of American companies which were wrongfully frozen is addressed. I urge the committee to permit payment to companies like mine that shipped goods based on irrevocable letters of credit and fulfilled all contractual obligations well before the freeze. Then the issues involved in distributing true Iraqi assets can be clearly sorted out.

H.R. 3221
Iraq Claims Act of 1993

Purpose

The purpose of H.R. 3221 is to provide a fair and orderly system for adjudicating the claims of U.S. nationals against Iraq. This bill provides the necessary authority to establish, maintain, and ultimately terminate such a system.

The bill authorizes the vesting of frozen Iraqi assets to pay claims that are not within the jurisdiction of the United Nations Compensation Commission (UN Commission) and authorizes the United States Foreign Claims Settlement Commission (U.S. Commission) to administer and, if necessary, allocate funds received from the UN Commission.

The UN Commission plans to use Iraqi oil exports to provide compensation to foreign governments, individuals and corporations that have suffered direct loss, damage, or injury as a result of Iraq's unlawful invasion and occupation of Kuwait. The UN Commission's mandate includes providing compensation to prisoners of war who suffered losses or injuries due to treatment that violated international humanitarian law.

Other losses suffered by U.S. claimants, such as pre-war debts and obligations, injury claims of seamen on the U.S.S. Stark, and death and injury claims of Operation Desert Storm veterans, fall outside the jurisdiction of the UN Commission. Under this legislation, these claims will be adjudicated by the U.S. Commission.

The bill also authorizes and provides procedures for the U.S. Commission to allocate to U.S. claimants any lump-sum awards that the U.S. may receive from the UN Commission if the UN Commission does not adjudicate claims on a case-by-case basis.

Section-by-Section Analysis

Section 1 -- Short title

Section 1 provides a short title of the "Iraq Claims Act of 1993" for purposes of this act.

Section 2 -- Adjudication of Claims.

Section 2(a) authorizes the US Commission to adjudicate any claims referred to it by the Secretary of State if the United States receives a lump-sum payment from the UN Commission in place of already adjudicated individual awards. The UN Commission plans to make claim-by-claim awards. These individual awards would be distributed to claimants through a trust fund established under existing law, without the intervention of the U.S. Commission. It is possible, however, that due to its massive docket, the UN Commission will instead sample the claims of each country and make lump-sum awards by country. Under this section, if the United States should receive such a lump sum award, the U.S. Commission could review the claims covered and allocate the lump sum payment accordingly.

Section 2(b) authorizes the U.S. Commission to adjudicate any claims by U.S. nationals that the Secretary of State determines fall outside the jurisdiction of the UN Commission. This category of claims includes all pre-war private claims against Iraq, including those arising from debt and other obligations. It also includes claims such as those arising from the attack on the USS Stark and certain claims of U.S. members of the allied coalition forces.

Section 2(c) directs the U.S. Commission, in deciding such claims, to apply relevant decisions of the U.N. Security Council and the UN Commission with respect to UN Commission lump sum allocations; applicable substantive law, including international law; and applicable principles of justice and equity.

Section 2(d) directs the U.S. Commission to decide before other claims, to the extent practical, all non-commercial claims of members of the Armed Forces and other individuals arising out of the invasion and occupation of Kuwait. The UN Commission similarly will give priority in processing to the claims of individuals for amounts less than $100,000. This provision will benefit any Persian Gulf War veterans who may have valid claims but whose claims fall outside the jurisdiction of the UN Commission.

Section 2(e) incorporates by reference the provisions of Title I and Title VII of the International Claims Settlement Act, 22 U.S.C. 1621 et seq., including the definition of U.S. national in Section 702(1) of the Act. This definition allows U.S. nationals with ownership interests in foreign corporations to present claims for a pro rata share of losses sustained by such corporations.

Section 3 -- Claims Funds.

Section 3(a) authorizes the Secretary of the Treasury to establish one or more UN Commission Claims Funds to receive payments made by the UN Commission.

Section 3(b) directs the Secretary of State to allocate funds received by the United States from the UN Commission between UN Commission Claims Funds and a special trust fund established in 1896. These allocations may be made in the manner the Secretary determines appropriate, using the following guidelines: If the UN Commission makes lump sum awards that cover multiple claimants, funds would be allocated to the UN Commission Claims Funds established under Section 3(a); the U.S. Commission would determine the distribution of the funds among the claimants. If the UN Commission makes individual awards to claimants, the special trust fund authority would be used because it permits monies received in this manner from the UN Commission to be deposited into the U.S. Treasury in trust for claimants, to be paid out at the direction of the Secretary of State. The U.S. Commission would not review the UN Commission individual awards.

Section 3(c) authorizes the Secretary of the Treasury to establish an Iraq Claims Fund. This fund would receive amounts allocated by the President to pay the claims of U.S. nationals for losses that proceeded Iraq's invasion and occupation of Kuwait, or that losses suffered by U.S. service personnel in the course of the Operation Desert Storm. Frozen Iraqi assets vested and liquidated under this act would provide the source for such funds.

Section 3(d) allows the President the discretion to allocate the proceeds of vested frozen Iraqi assets between the claims fund established to cover U.S. Commission awards to non-UN Commission private claimants and other accounts to provide for payment of claims of the United States Government. It is currently contemplated that the President will allocate such funds proportionately. In other words, if one-third of the claims against the Government of Iraq are made by the U.S. Government, and two-thirds of such claims are made by U.S. nationals, then one-third of the proceeds of vested frozen Iraqi assets will go toward satisfying U.S. Government claims.

Section 4 -- Authority to vest Iraqi Assets.

Section 4 authorizes the President to vest and liquidate frozen assets of the Government of Iraq in the United States. These assets have been blocked, or frozen, under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). The President may vest and liquidate as much of these assets as necessary to make payment to U.S. nationals, through the U.S. Commission, or to the United States Government, when either groups' claims fall outside the jurisdiction of the UN Commission.

Section 5 -- Program Administration Self-Sufficiency.

Section 5(a) requires the Secretary of the Treasury to deduct an amount equal to 1.5 percent from any funds obtained to pay claims, whether from the UN Commission Claims Funds established under Section 3(a) or the Iraq

Claims Funds established under Section 3(b). This amount will be used to reimburse the U.S. Government for its expenses in administering the Iraq claims program and this act.

Section 5(b) requires the Secretary of the Treasury to consult with the Chairman of the U.S. Commission and the Secretary of State to determine how best to allocate the amount deducted under Section 4(a). This amount would be used to reimburse or make an advance for credit to Executive agencies for their expenses in administering the Iraq claims program or the act.

Section 6 -- Payments.

Section 6(a) establishes the payment mechanism for awards made by the U.S. Commission, including awards based on lump-sum amounts received from the UN Commission. Upon certification of an award by the U.S. Commission to the Treasury Department, the Secretary of the Treasury is directed to make payments as follows: to the extent funds are available, an initial amount up to $10,000 or the principal amount of the award, whichever is less; again, to the extent funds are available, a further $90,000 or the principal amount of the award, whichever is less, on all pending non-commercial claims of members of the U.S. Armed Forces and other individuals arising from Iraq's invasion and occupation of Kuwait; and as additional funds become available, proportionate amounts, first of principal, and then, interest, to all claimants to receive awards. After payments has been made in full on all awards to be paid from either the UN Commission Claims Funds or the Iraq Claims Fund, any remaining monies in one fund will be transferred to the other funds.

Section 6(b) provides that a claimant's rights against the Government of Iraq are not extinguished with respect to any unsatisfied portion of his or her award.

Section 7 -- Records.

Section 7(a) directs the heads of all Executive agencies make available to the U.S. Commission all relevant records.

Section 7(b) states that the Freedom of Information Act will not apply with respect to any records that the Secretary of State determines relate to claims within the jurisdiction of the United Nations Commission and would not be available to the public under the rules and decisions of the United Nations Commission. This provision is required to allow the United States to comply with the more restrictive confidentiality requirements of the UN Commission.

Section 8 -- Statute of Limitations; Disposition of Unpaid Certified Claims.

Section 8(a) provides that any demand or claim for payment of an award certified under the Iraq claims program is barred one year after the publication date of the notice required by section 8(b).

Section 8(b) directs that nine years after either the last date on which the Secretary of the Treasury covers into any of the UN Commission Claims Funds or into any fund described in section 3(b)(2) amounts allocated under Section 3(b) or the last date on which the Secretary of the Treasury covers into the Iraq Claims Fund amounts allocated to that fund under Section 3(d), the Secretary must publish a notice in the Federal Register detailing the statute of limitations provided for in section 8(a) and identifying the claim numbers and awardee names of unpaid claims.

Section 8(c) requires that two years after the Section 8(b) publication date, any unpaid certified claim amount under the Iraq claims program, and any remaining balance under any of the UN Commission Claims Funds, in the Iraq Claims Fund, or in any fund referred to in section 3(b)(2) to the extent such balance reflects amounts deposited under that section, must be deposited in the miscellaneous receipts of the Treasury.

Section 9 -- Definitions.

As used in the act,

"Government of Iraq" includes agencies, instrumentalities, and controlled entities (including public sector enterprises) of that government;

"Executive agency" means an Executive department, a government corporation, and an independent establishment, as defined by section 105 of title 5, United States Code;

"Iraq claims program" means the claims whose adjudication is provided for in this act, and any other claims that are within the jurisdiction of the United Nations Commission;

"United Nations Commission" means the United Nations Compensation Commission established under United Nations Security Council Resolution 687 (1991); and

"United States Commission" means the Foreign Claims Settlement Commission of the United States.

Additional analysis

There are several provisions in the administration request that were omitted from the text of H.R. 3221. These provisions are still covered by the legislation, however, because they are contained either in Title I or Title VII of the International Claims Settlement Act.

By incorporating Title I and Title VII by reference in Section 2(e), this act provides the following:

(1) Compensation a U.S. claimant receives from any other source must be deducted from any U.S. Commission award, as provided in Section 703 of the International Claims Settlement Act. (The UN Commission similarly requires that compensation received from any other sources must be deducted from UN Commission awards.)

(2) The claims funds established by this act may earn interest, as provided under Section 8(g) of the International Claims Settlement Act.

(3) If any provision of the act or the application thereof to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances will not be affected, as provided under Section 716 of the International Claims Settlement Act.

DEPARTMENT OF THE TREASURY
WASHINGTON, D C

October 7, 1993

SECRETARY OF THE TREASURY

The Honorable Lee Hamilton
Chairman
Foreign Affairs Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On August 2, 1993, the Clinton Administration's proposed Iraq Claims Act of 1993 was transmitted to Congress. The purpose of the Iraq Claims Act is to provide a fair and orderly system for adjudication of claims of U.S. nationals and the United States against Iraq, and for utilizing blocked Iraqi assets in the United States and Iraqi funds received from the United Nations Compensation Commission for their satisfaction. We believe that this bill incorporates the best approach to compensation issues, one that allocates available compensation equitably among similarly-situated claimants. The bill would authorize adjudication of U.S. nationals' claims in a single forum, the Foreign Claims Settlement Commission, and permit the President to compensate claimants, including the U.S. Government, by vesting blocked Iraqi assets in the United States. We believe this approach far preferable to the piecemeal approach represented by legislation addressing only small segments of the claimant community, such as the proposed Secured Payment Act of 1993 (S. 1119).

The Secured Payment Act of 1993 seeks to provide compensation on a preferential basis for a small class of U.S. businesses with claims against Iraq based on letters of credit. The bill creates an inequitable compensation regime, creating disparate treatment between unsecured U.S. creditors holding letters of credit, and other unsecured U.S. creditors such as individual claimants and Gulf War veterans.

The Secured Payment Act would permit U.S. nationals with letters of credit to gain access to blocked assets of the foreign bank that issued the letter of credit, even where there is no U.S. bank obligation to pay on the letter of credit. The bill would affect all sanctions programs imposed under an International Emergency Economics Powers Act emergency declaration (at present Libya, Iraq, and Yugoslavia), and, as noted above, create an inequitable compensation regime; unsecured U.S. creditors holding letters of credit would be satisfied in full, while other unsecured creditors would receive significantly less, or possibly

nothing. It contains numerous inconsistencies with established international principles governing letters of credit, which could reduce the competitiveness of U.S. financial institutions and vendors in international commerce by granting U.S. letter of credit beneficiaries rights beyond those established under internationally-accepted letter of credit practices. In sum, the Secured Payment Act attempts to deal with a difficult issue in a piecemeal fashion by giving preference to one group of competing claimants over other U.S. nationals with equally compelling legal claims.

The prohibitions and policies implementing the Presidential declaration of national emergency with respect to Iraq are set forth in the Iraqi Sanctions Regulations, 31 C.F.R. Part 575 (the "Regulations"). The Department's policy with respect to pre-sanctions letters of credit is set out at section 575.510 of the Regulations. It provides a reasonable and properly limited basis for permitting the unblocking of Iraqi government property only where payment under a letter of credit is required to reimburse a mandatory and binding payment obligation of a U.S. bank. This occurs where an irrevocable letter of credit is issued or confirmed by a U.S. bank, or a letter of credit reimbursement is confirmed by a U.S. bank, because confirming banks have a binding legal obligation to pay a beneficiary who has fulfilled the terms of the letter of credit. This obligation exists whether or not the confirming bank can obtain reimbursement from the Iraqi issuing bank. Advising banks have no such obligation. A bank which advises a letter of credit is not legally obligated to pay a beneficiary even if the beneficiary complies in full with the terms of the Iraqi letter of credit.

This licensing policy distinction in the Regulations is based on distinctions in letter of credit obligations universally recognized in banking and international financial transactions. These differing obligations are set forth in the Uniform Customs and Practices for Documentary Credits, which are incorporated by reference as the governing law of most international letters of credit.

We do not see a valid legal or public policy basis for the suggestion that access to blocked Iraqi assets be afforded to beneficiaries of advised Iraqi letters of credit on which no person in the United States has any payment obligation. Such beneficiaries are not differently situated from any other unsecured creditor of Iraq, and should not receive priority over other unsecured U.S. creditors. Moreover, the inequitable compensation regime provided by the Secured Payment Act is inconsistent with the U.N. compensation regime, which is complemented by the Iraq Claims Act of 1993. We hope that you and the members of the Committee will join us in supporting the inclusive and equitable approach taken in the Iraq Claims Act of 1993.

Sincerely,

Lloyd Bentsen

BASIC LETTER OF CREDIT PRINCIPLES

Professor James E. Byrne
George Mason University
School of Law

20 October 1993

I. What Are Letters of Credit?

Letters of Credit are mercantile undertakings whereby an issuer undertakes to honor upon presentation of required documents. See UCP 400 Article 10; UCP 500 Article 9; UCC Article 5 Section 5-103(1)(a); UNCITRAL Draft Article 2.

A letter of credit is not:

. a contract (no offer/acceptance; no mutuality).

. a guarantee (the obligation turns upon presentation of documents rather than the occurrence of events--i.e. the building is built).

. a negotiable instrument (it is conditional upon presentation of stipulated documents).

II. Sources of Letter of Credit Law.

The modern letter of credit arose in the early 19th century in commodity transactions in which merchant banks undertook to accept drafts drawn upon them and accompanied by stipulated documents (virtual acceptances--Section 135 of the Negotiable Instruments Law). Gradually, they ceased to do so for their own account and provided this service for others. Letter of credit transactions were centered in London until 1916 and the world system turned upon the particular practices of each of the London clearing banks.

With the fiscal constraints imposed by World War I and the increasing requirements for imports, the center of world trade finance shifted to New York in 1916. Since no one or discrete combination of banks dominated U.S. or world finance, it became necessary to develop an international system of correspondent banking to finance international trade. This system evolved into the Uniform Customs and Practice for Documentary Credits which embody internationally accepted rules of letter of credit practice. While not positive or juridical law, they, nonetheless, provide the universally accepted foundation for letter of credit law and practice and have been so recognized by courts in the U.S. and elsewhere. The Office of Management and Budget has mandated incorporation of the UCP into standbys issued in favor of U.S.

government agencies under the Miller Act. 56 Fed. Reg. 58,932 (Nov. 22, 1991). The current revision of the UCP is contained in ICC Publication 400 which is effective until December 31, 1993 when it will be replaced by UCP 500.

Others sources of letter of credit law are domestic judicial decisions and positive law. Article 5 (Letters of Credit) of the Uniform Commercial Code. The latter represents the first attempt to codify letter of credit law. While useful in some respects, it fails in important respects to address the vital issue of the appropriate relationship between law and practice in this field and for that reason failed to be adopted in a meaningful manner in New York which, at the time, was the center of U.S. letter of credit practice. See New York's non-conforming Section 5-102(4).

At the current time, the United Nations Commission on International Trade Law (UNCITRAL) is engaged in a useful and important project to create an international convention on international guarantees and standby letters of credit. Under the able direction of the Secretariat, a workable basis has emerged by which these important instruments of international commerce can be linked. See U.S. Proposed Standby Rules, A/CN.9/WG.II/WP.77. In addition, a project is now underway to revise UCC Article 5. As it has evolved, there has been an increasing convergence of views between the National Conference of Commissioners on Uniform State Laws and the international operations community which, if it continues, should mature into a sound revision. See 45 Bus. Law 1521 (1990).

III. Transactional Setting

A. Commercial Letters of Credit

Letters of credit as they originally developed were used to provide an independent paymaster for transactions in which the buyer and seller were distant. They formed a neutral solution to the eternal dilemma between buyer and seller: the seller is unwilling to part with the goods without receiving payment and the buyer is unwilling to part with money without receiving good goods. In such a situation, both may be willing to trust an independent paymaster who will pay upon receipt of documents which represent shipment of good goods. The success of the letter of credit is due entirely to its ability to offer both parties a reasonable mechanism by which their reasonable expectations may be fulfilled.

B. Performance Standbys

From the original sales context, letters of credit began to be used in the mid to late 1950s to assure performance of sales transactions. From there, they were used in lieu of suretyship bonds to assure performance of transactions as disparate as installing telephone systems in foreign countries and building

buildings according to specifications.

C. Financial Standbys

In addition to assuring performance of undertaking to perform acts, standbys came to be used to assure performance of financial undertakings. Indeed, commercial paper and financial markets since the late 1970s recognized the value of enhancement of a promise of an obligor by virtue of that of an independent and more credit-worthy third party. As a result, there has arisen a market by which financial standbys support debt obligations of state and municipal governments as well as private entities.

D. Statistics.

Statistics are difficult to come by outside the U.S. Recent figures indicate that there are approximately U.S.$25 billion outstanding in FDIC insured institutions in commercial L/Cs. Conservative figures would suggest an additional $60 billion worldwide. There are approximately $75 billion outstanding in FDIC insured performance standbys. There may be an additional $100 billion by foreign banks. There are approximately $100 billion in financial standbys issued by FDIC insured banks with an approximate $200 billion issued by foreign banks. The total of obligations in letters of credit, then, may be $560 billion worldwide outstanding in letters of credit.

IV. Obligations of the Parties.

A. Issuer.

The obligation of the issuer is to pay against presentation of conforming documents. See UCP 400 Articles 2 & 15; UCP 500 Articles 2 & 13; UCC Article 5 Section 5-114(1); UNCITRAL Draft Article 6 (3).

B. Confirmer.

The confirming bank extends its independent obligation and is obligated to the beneficiary as if it was the issuer. See UCP 400 Article 10; UCP 500 Article 9(b); UCC Article 5 Section 5-103(1) (f); UNCITRAL Draft Article 6 (5).

C. Adviser.

An advising bank undertakes no obligation under the credit. It checks the apparent authenticity of the credit. UCP 400 Article 8; UCP 500 Article 7(a); UCC Article 5 Section 5-107(1). As such, the advising bank has no obligation or authorization to honor documents presented under the credit.

D. Nominated Paying Bank.

The credit may nominate a bank to which documents should be presented for honor. This bank is under no obligation to honor but, should it do so, is entitled to reimbursement. UCP 400 Article 11(b); UCP 500 Article 10(b).

E. Confirmed Reimbursements.

A credit or separate instruction may authorize a bank to issue an irrevocable undertaking to reimburse a bank authorized to honor a credit. This undertaking would run to a confirmer, nominated paying bank, or a negotiating bank. It does not affect the obligation of the bank to honor and, except for the confirming bank, there is no such obligation under the credit. To the extent that a nominated bank relies on a confirmed reimbursement, it is entitled to reimbursement as is the bank which itself undertakes to make a confirmed reimbursement. Under a confirmed reimbursement, the paying bank which honors would send the documents directly to the issuer but seek reimbursement from the reimbursing bank. See USCIB Reimbursement Guidelines.

F. Types of Credits: Honor: Acceptances & Deferred Payment Undertakings.

A credit may be available by payment in which case it is honored by immediate payment upon presentation of conforming documents. If may, however, be available by acceptance, deferred payment or negotiation. Where it is available by means of acceptances or deferred payment undertakings, the undertaking of the confirmer (or a nominated paying bank which accepts or undertakes a deferred payment undertaking) is to pay upon the lapse of the time indicated. See, e.g., UCP 400 Article 10(a)(iii) & (iv); UCP 500 Article 9(a)(iii) & (iv).

G. Types of Credits: Honor: Negotiation Credits.

While credits are not negotiable instruments, if they are expressly designated as negotiation credits, drafts can be negotiated under them. If a bank is nominated under a negotiation credit, it is entitled to negotiate conforming drafts and, where it does so, obtain reimbursement. See UCP 400 Article 10(a) (iv); UCP 500 Article 9(a) (iv).

V. Foundational Principles.

A. Independence from the Underlying Transaction.

The letter of credit is abstracted from the underlying transaction because of its intermediate character: it is documentary and honor does not turn upon ultimate fact-finding but upon a facial determination of documentary conformity.

B. Compliance Measured by International Standard Banking Practices

Whether or not documents comply with the terms and conditions of the letter of credit is measured not by a mirror image test but a mercantile test determined by the character and role of the documents in the letter of credit transaction itself. Over the past century, standards have evolved which are internationally recognized and are reflected in the UCP and in standard banking practices. The obligation of the issuer or confirmer under a letter of credit is only to pay upon timely presentation of documents which conform with the terms and conditions of the credit. See UCP 400 Article 15; UCP 500 Article 13; UCC Article 5 Sections 5-109 & 5-114(1).

C. Neutrality/Fairness.

Letter of credit practice and law does not create norms which favor unduly any party to the transaction. As the rules are articulated from time to time, they seek to establish norms which represent typical market expectations with the option for variance if the parties so elect.

D. Role of Correspondent Banking.

The modern letter of credit correspondent banking credit system is predicated upon principles of comity. Since no one bank dominates the world system, interaction between banks is essential. Since banks are subject to widely differing systems and rules of laws, it is essential that they be able to be reimbursed where they have entered into an irrevocable undertaking or honored according to the terms and conditions of the credit.

E. The Need for Hard Promises.

The letter of credit has achieved universal acceptance as a mechanism for payment where conforming documents are presented. Except in extraordinary situations, the only condition to payment is whether conforming documents are presented.

U.S. COUNCIL ON INTERNATIONAL BANKING, INC.
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UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, 1983 REVISION, ICC PUBLICATION NO. 400.

The **Uniform Customs and Practice for Documentary Credits** were first published by the International Chamber of Commerce (I.C.C.) in 1933. Revised versions were issued in 1951, 1962 and 1974. This latest revision was adopted by the I.C.C. in June 1983 and published as publication No. 400 and is effective October 1st 1984. These rules, which are printed in their entirety herein, effectively standardize the banking practice relating to Documentary Credits and are adhered to by banks throughout the world.

A. General provisions and definitions

Article 1

These articles apply to all documentary credits, including, to the extent to which they may be applicable, standby letters of credit, and are binding on all parties thereto unless otherwise expressly agreed. They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication n° 400.

Article 2

For the purposes of these articles, the expressions "documentary credit(s)" and "standby letter(s) of credit" used herein (hereinafter referred to as "credit(s)"), mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for the credit),

i is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary,

or

ii authorizes another bank to effect such payment, or to pay, accept or negotiate such bills of exchange (drafts),

against stipulated documents, provided that the terms and conditions of the credit are complied with.

Article 3

Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credit.

Article 4

In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate.

Article 5

Instructions for the issuance of credits, the credits themselves, instructions for any amendments thereto and the amendments themselves must be complete and precise.

In order to guard against confusion and misunderstanding, banks should discourage any attempt to include excessive detail in the credit or in any amendment thereto.

Article 6

A beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the applicant for the credit and the issuing bank.

B. Form and notification of credits

Article 7

a Credits may be either
  i revocable, or
  ii irrevocable.

b All credits, therefore, should clearly indicate whether they are revocable or irrevocable.

c In the absence of such indication the credit shall be deemed to be revocable.

Article 8

A credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of the advising bank, but that bank shall take reasonable care to check the apparent authenticity of the credit which it advises.

Article 9

a A revocable credit may be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary.

b However, the issuing bank is bound to:

  i reimburse a branch or bank with which a revocable credit has been made available for sight payment, acceptance or negotiation, for any payment, acceptance or negotiation made by such branch or bank prior to receipt by it of notice of amendment or cancellation, against documents which appear on their face to be in accordance with the terms and conditions of the credit.

  ii reimburse a branch or bank with which a revocable credit has been made available for deferred payment, if such branch or bank has, prior to receipt by it of notice of amendment or cancellation, taken up documents which appear on their face to be in accordance with the terms and conditions of the credit.

Article 10

a An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:

  i if the credit provides for sight payment — to pay, or that payment will be made;

  ii if the credit provides for deferred payment — to pay, or that payment will be made, on the date(s) determinable in accordance with the stipulations of the credit,

  iii if the credit provides for acceptance — to accept drafts drawn by the beneficiary if the credit stipulates that they are to be drawn on the issuing bank, or to be responsible for their acceptance and payment at maturity if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit,

  iv if the credit provides for negotiation — to pay without recourse to drawers and/or bona fide holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee stipulated in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.

b When an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter has added its confirmation, such confirmation constitutes a definite undertaking of such bank (the confirming bank), in addition to that of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:

  i if the credit provides for sight payment — to pay, or that payment will be made,

  ii if the credit provides for deferred payment — to pay, or

that payment will be made, on the date(s) determinable in accordance with the stipulations of the credit.

iii if the credit provides for acceptance — to accept drafts drawn by the beneficiary if the credit stipulates that they are to be drawn on the confirming bank, or to be responsible for their acceptance and payment at maturity, if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit.

iv if the credit provides for negotiation — to negotiate without recourse to drawers and/or bona fide holders draft(s) drawn by the beneficiary, at sight or at a tenor, on the issuing bank or on the applicant for the credit or on any other drawee stipulated in the credit other than the confirming bank itself

c If a bank is authorized or requested by the issuing bank to add its confirmation to a credit but is not prepared to do so it must so inform the issuing bank without delay Unless the issuing bank specifies otherwise in its confirmation authorization or request, the advising bank will advise the credit to the beneficiary without adding its confirmation

d Such undertakings can neither be amended nor cancelled without the agreement of the issuing bank the confirming bank (if any), and the beneficiary Partial acceptance of amendments contained in one and the same advice of amendment is not effective without the agreement of all the above and named parties

Article 11

a All credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation

b All credits must nominate the bank (nominated bank) which is authorized to pay (paying bank), or to accept drafts (accepting bank), or to negotiate (negotiating bank), unless the credit allows negotiation by any bank (negotiating bank)

c Unless the nominated bank is the issuing bank or the confirming bank, its nomination by the issuing bank does not constitute any undertaking by the nominated bank to pay, to accept, or to negotiate

d By nominating a bank other than itself, or by allowing for negotiation by any bank, or by authorizing or requesting a bank to add its confirmation, the issuing bank authorizes such bank to pay accept or negotiate, as the case may be, against documents which appear on their face to be in accordance with the terms and conditions of the credit, and undertakes to reimburse such bank in accordance with the provisions of these articles

Article 12

a When an issuing bank instructs a bank (advising bank) by any teletransmission to advise a credit or an amendment to a credit, and intends the mail confirmation to be the operative credit instrument, or the operative amendment the teletransmission must state "full details to follow" (or words of similar effect), or that the mail confirmation will be the operative credit instrument or the operative amendment The issuing bank must forward the operative credit instrument or the operative amendment to such advising bank without delay

b The teletransmission will be deemed to be the operative credit instrument or the operative amendment, and no mail confirmation should be sent, unless the teletransmission states "full details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument or the operative amendment

c A teletransmission intended by the issuing bank to be the operative credit instrument should clearly indicate that the credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication n 400

d If a bank uses the services of another bank or banks (the advising bank) to have the credit advised to the beneficiary it must also use the services of the same bank(s) for advising any amendments

e Banks shall be responsible for any consequences arising from their failure to follow the procedures set out in the preceding paragraphs

Article 13

When a bank is instructed to issue, confirm or advise a credit similar in terms to one previously issued, confirmed or advised (similar credit) and the previous credit has been the subject of amendment(s), it shall be understood that the similar credit will not include any such amendment(s) unless the instructions specify clearly the amendment(s) which is/are to apply to the similar credit Banks should discourage instructions to issue, confirm or advise a credit in this manner

Article 14

If incomplete or unclear instructions are received to issue, confirm, advise or amend a credit, the bank requested to act on such instructions may give preliminary notification to the beneficiary for information only and without responsibility The credit will be issued, confirmed, advised or amended only when the necessary information has been received and if the bank is then prepared to act on the instructions Banks should provide the necessary information without delay

C. Liabilities and responsibilities

Article 15

Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit

Article 16

a If a bank so authorized effects payment, or incurs a deferred payment undertaking, or accepts, or negotiates against documents which appear on their face to be in accordance with the terms and conditions of a credit, the party giving such authority shall be bound to reimburse the bank which has effected payment, or incurred a deferred payment undertaking, or has accepted, or negotiated, and to take up the documents

b If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit

c The issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents

d If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to the presentor (remitting bank or the beneficiary, as the case may be) The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank

e If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit

f If the remitting bank draws the attention of the issuing bank to any discrepancies in the documents or advises the issuing bank that it has paid, incurred a deferred payment undertaking, accepted or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank shall not be thereby relieved from any of its obligations under any provision of this article Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained

Article 17

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity weight, quality, condition, packing, delivery, value or existence of the goods represented by any documents, or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers, or the insurers of the goods, or any other person whomsoever

Article 18
Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them.

Article 19
Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts. Unless specifically authorized, banks will not, upon resumption of their business, incur a deferred payment undertaking, or effect payment, acceptance or negotiation under credits which expired during such interruption of their business.

Article 20

a. Banks utilizing the services of another bank or other banks for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of such applicant.

b. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).

c. The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign law and usages.

Article 21

a. If an issuing bank intends that the reimbursement to which a paying, accepting or negotiating bank is entitled shall be obtained by such bank claiming on another branch or office of the issuing bank or on a third bank (all hereinafter referred to as the reimbursing bank) it shall provide such reimbursing bank in good time with the proper instructions or authorization to honour such reimbursement claims and without making it a condition that the bank entitled to claim reimbursement must certify compliance with the terms and conditions of the credit to the reimbursing bank.

b. An issuing bank will not be relieved from any of its obligations to provide reimbursement itself if and when reimbursement is not effected by the reimbursing bank.

c. The issuing bank will be responsible to the paying, accepting or negotiating bank for any loss of interest if reimbursement is not provided on first demand made to the reimbursing bank, or as otherwise specified in the credit, or mutually agreed, as the case may be.

D. Documents

Article 22

a. All instructions for the issuance of credits and the credits themselves and, where applicable, all instructions for amendments thereto and the amendments themselves, must state precisely the document(s) against which payment, acceptance or negotiation is to be made.

b. Terms such as "first class", "well known", "qualified", "independent", "official", and the like shall not be used to describe the issuers of any documents to be presented under a credit. If such terms are incorporated in the credit terms, banks will accept the relative documents as presented, provided that they appear on their face to be in accordance with the other terms and conditions of the credit.

c. Unless otherwise stipulated in the credit, banks will accept as originals documents produced or appearing to have been produced

i. by reprographic systems,

ii. by, or as the result of, automated or computerized systems,

iii. as carbon copies,

if marked as originals, always provided that, where necessary, such documents appear to have been authenticated.

Article 23
When documents other than transport documents, insurance documents and commercial invoices are called for, the credit should stipulate by whom such documents are to be issued and their wording or data content. If the credit does not so stipulate, banks will accept such documents as presented, provided that their data content makes it possible to relate the goods and/or services referred to therein to those referred to in the commercial invoice(s) presented, or to those referred to in the credit if the credit does not stipulate presentation of a commercial invoice.

Article 24
Unless otherwise stipulated in the credit, banks will accept a document bearing a date of issuance prior to that of the credit, subject to such document being presented within the time limits set out in the credit and in these articles.

D 1 Transport documents (documents indicating loading on board or dispatch or taking in charge)

Article 25
Unless a credit calling for a transport document stipulates as such document a marine bill of lading (ocean bill of lading or a bill of lading covering carriage by sea), or a post receipt or certificate of posting:

a. banks will, unless otherwise stipulated in the credit, accept a transport document which:

i. appears on its face to have been issued by a named carrier, or his agent, and

ii. indicates dispatch or taking in charge of the goods, or loading on board, as the case may be, and

iii. consists of the full set of originals issued to the consignor if issued in more than one original, and

iv. meets all other stipulations of the credit.

b. Subject to the above, and unless otherwise stipulated in the credit, banks will not reject a transport document which:

i. bears a title such as "Combined transport bill of lading", "Combined transport document", "Combined transport bill of lading or port-to-port bill of lading", or a title or a combination of titles of similar intent and effect, and/or

ii. indicates some or all of the conditions of carriage by reference to a source or document other than the transport document itself (short form/blank back transport document), and/or

iii. indicates a place of taking in charge different from the port of loading and/or a place of final destination different from the port of discharge, and/or

iv. relates to cargoes such as those in containers or on pallets, and the like, and/or

v. contains the indication "intended", or similar qualification, in relation to the vessel or other means of transport, and/or the port of loading and/or the port of discharge.

c. Unless otherwise stipulated in the credit in the case of carriage by sea or by more than one mode of transport but including carriage by sea, banks will reject a transport document which:

i. indicates that it is subject to a charter party, and/or

ii. indicates that the carrying vessel is propelled by sail only.

d. Unless otherwise stipulated in the credit, banks will reject a transport document issued by a freight forwarder unless it is the FIATA Combined Transport Bill of Lading approved by the International Chamber of Commerce or otherwise indicates that it is issued by a freight forwarder acting as a carrier or agent of a named carrier.

Article 26
If a credit calling for a transport document stipulates as such document a marine bill of lading:

a. banks will, unless otherwise stipulated in the credit, accept a document which:

i. appears on its face to have been issued by a named carrier, or his agent, and

ii. indicates that the goods have been loaded on board or shipped on a named vessel, and

iii. consists of the full set of originals issued to the consignor if issued in more than one original, and

iv. meets all other stipulations of the credit.

b. Subject to the above, and unless otherwise stipulated in the credit, banks will not reject a document which:

i. bears a title such as "Combined transport bill of lading", "Combined transport document", "Combined transport bill of lading or port-to-port bill of lading", or a title or a combination of titles of similar intent and effect, and/or

ii. indicates some or all of the conditions of carriage by reference to a source or document other than the transport document itself (short form/blank back transport document), and/or

iii. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge, and/or

iv relates to cargoes such as those in containers or on pallets, and the like

c. Unless otherwise stipulated in the credit, banks will reject a document which:

i indicates that it is subject to a charter party, and/or

ii indicates that the carrying vessel is propelled by sail only, and/or

iii contains the indication "intended", or similar qualification in relation to

• the vessel and/or the port of loading — unless such document bears an on board notation in accordance with article 27 (b) and also indicates the actual port of loading, and/or

• the port of discharge — unless the place of final destination indicated on the document is other than the port of discharge, and/or

iv is issued by a freight forwarder, unless it indicates that it is issued by such freight forwarder acting as a carrier, or as the agent of a named carrier.

Article 27

a Unless a credit specifically calls for an on board transport document, or unless inconsistent with other stipulation(s) in the credit, or with article 26, banks will accept a transport document which indicates that the goods have been taken in charge or received for shipment.

b Loading on board or shipment on a vessel may be evidenced either by a transport document bearing wording indicating loading on board a named vessel or shipment on a named vessel, or, in the case of a transport document stating "received for shipment", by means of a notation of loading on board on the transport document signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel.

Article 28

a. In the case of carriage by sea or by more than one mode of transport but including carriage by sea, banks will refuse a transport document stating that the goods are or will be loaded on deck, unless specifically authorized in the credit.

b. Banks will not refuse a transport document which contains a provision that the goods may be carried on deck, provided it does not specifically state that they are or will be loaded on deck.

Article 29

a For the purpose of this article transshipment means a transfer and reloading during the course of carriage from the port of loading or place of dispatch or taking in charge to the port of discharge or place of destination either from one conveyance or vessel to another conveyance or vessel within the same mode of transport or from one mode of transport to another mode of transport

b. Unless transshipment is prohibited by the terms of the credit, banks will accept transport documents which indicate that the goods will be transshipped, provided the entire carriage is covered by one and the same transport document.

c. Even if transshipment is prohibited by the terms of the credit, banks will accept transport documents which

i incorporate printed clauses stating that the carrier has the right to tranship, or

ii state or indicate that transshipment will or may take place, when the credit stipulates a combined transport document, or indicates carriage from a place of taking in charge to a place of final destination by different modes of transport including a carriage by sea, provided that the entire carriage is covered by one and the same transport document, or

iii state or indicate that the goods are in a container(s), trailer(s), "LASH" barge(s), and the like and will be carried from the place of taking in charge to the place of final destination in the same container(s), trailer(s), "LASH" barge(s), and the like under one and the same transport document

iv state or indicate the place of receipt and/or of final destination as "C.F.S." (container freight station) or "C.Y." (container yard) at, or associated with, the port of loading and/or the port of destination.

Article 30

If the credit stipulates dispatch of goods by post and calls for a post receipt or certificate of posting, banks will accept such post receipt or certificate of posting if it appears to have been stamped or otherwise authenticated and dated in the place from which the credit stipulates the goods are to be dispatched

Article 31

a Unless otherwise stipulated in the credit, or inconsistent with any of the documents presented under the credit, banks will accept transport documents stating that freight or transportation charges (hereinafter referred to as "freight") have still to be paid

b If a credit stipulates that the transport document has to indicate that freight has been paid or prepaid, banks will accept a transport document on which words clearly indicating payment or prepayment of freight appear by stamp or otherwise, or on which payment of freight is indicated by other means

c The words "freight prepayable" or "freight to be prepaid" or words of similar effect, if appearing on transport documents, will not be accepted as constituting evidence of the payment of freight

d Banks will accept transport documents bearing reference by stamp or otherwise to costs additional to the freight charges, such as costs of, or disbursements incurred in connection with, loading, unloading or similar operations, unless the conditions of the credit specifically prohibit such reference

Article 32

Unless otherwise stipulated in the credit, banks will accept transport documents which bear a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect

Article 33

Unless otherwise stipulated in the credit, banks will accept transport documents indicating as the consignor of the goods a party other than the beneficiary of the credit

Article 34

a A clean transport document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging

b Banks will refuse transport documents bearing such clauses or notations unless the credit expressly stipulates the clauses or notations which may be accepted

c Banks will regard a requirement in a credit for a transport document to bear the clause "clean on board" as complied with if such transport document meets the requirements of this article and of article 27 (b)

D2 Insurance documents

Article 35

a Insurance documents must be as stipulated in the credit, and must be issued and/or signed by insurance companies or underwriters, or their agents

b. Cover notes issued by brokers will not be accepted, unless specifically authorized by the credit

Article 36

Unless otherwise stipulated in the credit, or unless it appears from the insurance document(s) that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will refuse insurance documents presented which bear a date later than the date of loading on board or dispatch or taking in charge of the goods as indicated by the transport document(s)

Article 37

a Unless otherwise stipulated in the credit, the insurance document must be expressed in the same currency as the credit

b. Unless otherwise stipulated in the credit, the minimum amount for which the insurance document must indicate the insurance cover to have been effected is the CIF (cost, insurance and freight ... "named port of destination") or CIP (freight/carriage and insurance paid to "named point of destination") value of the goods, as the case may be, plus 10%. However, if banks cannot determine the CIF or CIP value, as the case may be, from the documents on their face, they will accept as such minimum amount the amount for which payment, acceptance or negotiation is requested under the credit, or the amount of the commercial invoice, whichever is the greater.

Article 38

a Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" should not be used, if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered

b Failing specific stipulations in the credit, banks will accept insurance documents as presented, without responsibility for any risks not being covered

Article 39

Where a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if indicating that certain risks are excluded, without responsibility for any risk(s) not being covered

Article 40

Banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible), unless it is specifically stipulated in the credit that the insurance must be issued irrespective of percentage.

D3 Commercial invoice

Article 41

a Unless otherwise stipulated in the credit, commercial invoices must be made out in the name of the applicant for the credit

b Unless otherwise stipulated in the credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the credit Nevertheless, if a bank authorized to pay, incur a deferred payment undertaking, accept, or negotiate under a credit accepts such invoices, its decision will be binding upon all parties, provided such bank has not paid, incurred a deferred payment undertaking, accepted or effected negotiation for an amount in excess of that permitted by the credit.

c The description of the goods in the commercial invoice must correspond with the description in the credit In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the credit

D4 Other documents

Article 42

If a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight which appears to have been superimposed on the transport document by the carrier or his agent unless the credit specifically stipulates that the attestation or certification of weight must be by means of a separate document

E. Miscellaneous provisions

Quantity and amount

Article 43

a The words "about", "circa" or similar expressions used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a difference not to exceed 10% more or 10% less than the amount or the quantity or the unit price to which they refer

b Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 5% more or 5% less will be permissible, even if partial shipments are not permitted, always provided that the amount of the drawings does not exceed the amount of the credit This tolerance does not apply when the credit stipulates the quantity in terms of a stated number of packing units or individual items

Partial drawings and/or shipments

Article 44

a Partial drawing and/or shipments are allowed, unless the credit stipulates otherwise.

b Shipments by sea, or by more than one mode of transport but including carriage by sea, made on the same vessel and for the same voyage, will not be regarded as partial shipments, even if the transport documents indicating loading on board bear different dates of issuance and/or indicate different ports of loading on board.

c. Shipments made by post will not be regarded as partial shipments if the post receipts or certificates of posting appear to have been stamped or otherwise authenticated in the place from which the credit stipulates the goods are to be dispatched, and on the same date

d Shipments made by modes of transport other than those referred to in paragraphs (b) and (c) of this article will not be regarded as partial shipments, provided the transport documents are issued by one and the same carrier or his agent and indicate the same date of issuance, the same place of dispatch or taking in charge of the goods, and the same destination

Drawings and/or shipments by instalments

Article 45

If drawings and/or shipments by instalments within given periods are stipulated in the credit and any instalment is not drawn and/or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalments, unless otherwise stipulated in the credit

Expiry date and presentation

Article 46

a All credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation

b Except as provided in Article 48 (a), documents must be presented on or before such expiry date.

c If an issuing bank states that the credit is to be available "for one month", "for six months" or the like, but does not specify the date from which the time is to run, the date of issuance of the credit by the issuing bank will be deemed to be the first day from which such time is to run Banks should discourage indication of the expiry date of the credit in this manner.

Article 47

a In addition to stipulating an expiry date for presentation of documents, every credit which calls for a transport document(s) should also stipulate a specified period of time after the date of issuance of the transport document(s) during which presentation of documents for payment, acceptance or negotiation must be made If no such period of time is stipulated, banks will refuse documents presented to them later than 21 days after the date of issuance of the transport document(s). In every case, however, documents must be presented not later than the expiry date of the credit

b For the purpose of these articles, the date of issuance of a transport document(s) will be deemed to be

i in the case of a transport document evidencing dispatch, or taking in charge, or receipt of goods for shipment by a mode of transport other than by air — the date of issuance indicated on the transport document or the date of the reception stamp thereon whichever is the later

ii in the case of a transport document evidencing carriage by air — the date of issuance indicated on the transport document or, if the credit stipulates that the transport document shall indicate an actual flight date, the actual flight date as indicated on the transport document

iii in the case of a transport document evidencing loading on board a named vessel — the date of issuance of the transport document or, in the case of an on board notation in accordance with article 27 (b), the date of such notation.

iv in cases to which Article 44 (b) applies, the date determined as above of the latest transport document issued

Article 48

a If the expiry date of the credit and/or the last day of the period of time after the date of issuance of the transport document(s) for presentation of documents stipulated by the credit or applicable by virtue of Article 47 falls on a day

on which the bank to which presentation has to be made is closed for reasons other than those referred to in article 19, the stipulated expiry date and/or the last day of the period of time after the date of issuance of the transport document(s) for presentation of documents, as the case may be, shall be extended to the first following business day on which such bank is open

b The latest date for loading on board, or dispatch, or taking in charge shall not be extended by reason of the extension of the expiry date and/or the period of time after the date of issuance of the transport document(s) for presentation of document(s) in accordance with this article If no such latest date for shipment is stipulated in the credit or amendments thereto, banks will reject transport documents indicating a date of issuance later than the expiry date stipulated in the credit or amendments thereto

c. The bank to which presentation is made on such first following business day must add to the documents its certificate that the documents were presented within the time limits extended in accordance with Article 48 (a) of the Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication N° 400.

Article 49

Banks are under no obligation to accept presentation of documents outside their banking hours

Loading on board, dispatch and taking in charge (shipment)

Article 50

a Unless otherwise stipulated in the credit, the expression "shipment" used in stipulating an earliest and/or a latest shipment date will be understood to include the expressions "loading on board", "dispatch" and "taking in charge"

b The date of issuance of the transport document determined in accordance with article 47 (b) will be taken to be the date of shipment

c Expressions such as "prompt", "immediately", "as soon as possible", and the like should not be used If they are used, banks will interpret them as a stipulation that shipment is to be made within thirty days from the date of issuance of the credit by the issuing bank

d If the expression "on or about" and similar expressions are used, banks will interpret them as a stipulation that shipment is to be made during the period from five days before to five days after the specified date, both end days included

Date terms

Article 51

The words "to", "until", "till", "from", and words of similar import applying to any date term in the credit will be understood to include the date mentioned The word "after" will be understood to exclude the date mentioned

Article 52

The terms "first half", "second half" of a month shall be construed respectively as from the 1st to the 15th, and the 16th to the last day of each month, inclusive

Article 53

The terms "beginning", "middle", or "end" of a month shall be construed respectively as from the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of each month, inclusive

F. Transfer

Article 54

a. A transferable credit is a credit under which the beneficiary has the right to request the bank called upon to effect payment or acceptance or any bank entitled to effect negotiation to make the credit available in whole or in part to one or more other parties (second beneficiaries)

b A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank Terms such as "divisible", "fractionnable", "assignable", and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used

c. The bank requested to effect the transfer (transferring bank), whether it has confirmed the credit or not, shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank

d Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified. The tranferring bank shall be under no obligation to effect the transfer until such charges are paid

e. A transferable credit can be transferred once only Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit prices stated therein, of the period of validity, of the last date for presentation of documents in accordance with Article 47 and the period for shipment, any or all of which may be reduced or curtailed, or the percentage for which insurance cover must be effected, which may be increased in such a way as to provide the amount of cover stipulated in the original credit, or these articles. Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled

f The first beneficiary has the right to substitute his own invoices (and drafts if the credit stipulates that drafts are to be drawn on the applicant for the credit) in exchange for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices (ano drafts) the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices When a credit has been transferred and the first beneficiary is to supply his own invoices (and drafts) in exchange for the second beneficiary's invoices (and drafts) but fails to do so on first demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the documents received under the credit, including the second beneficiary's invoices (and drafts) without further responsibility to the first beneficiary

g Unless otherwise stipulated in the credit, the first beneficiary of a transferable credit may request that the credit be transferred to a second beneficiary in the same country, or in another country Further, unless otherwise stipulated in the credit, the first beneficiary shall have the right to request that payment or negotiation be effected to the second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices and drafts (if any) for those of the second beneficiary and to claim any difference due to him

Assignment of proceeds

Article 55

The fact that a credit is not stated to be transferable shall not affect the beneficiary's right to assign any proceeds to which he may be, or may become, entitled under such credit, in accordance with the provisions of the applicable law

UCP 500

Uniform Customs and Practice for Documentary Credits

1993 Re[illegible] January 1, 1994

Leaflet Version, ICC No. 500 LF

The Uniform Customs and Practice for Documentary Credits were first published by the ICC in 1933. Revised versions were issued in 1951, 1962, 1974 and 1983. This Revision was adopted by the ICC Executive Board in April 1993 and first published as ICC Publication N°500 in May 1993. This English language edition of Publication N°500 gives the official text of the 1993 Revision.

A GENERAL PROVISIONS AND DEFINITIONS

Article 1

Application of UCP

The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500, shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit.

Article 2

Meaning of Credit

For the purposes of these Articles, the expressions "Documentary Credit(s)" and "Standby Letter(s) of Credit" (hereinafter referred to as "Credit(s)"), mean any arrangement, however named or described, whereby a bank (the "Issuing Bank") acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf,

- **i.** is to make a payment to or to the order of a third party (the "Beneficiary"), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary, **or**
- **ii.** authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)), **or**
- **iii.** authorises another bank to negotiate,

against stipulated document(s), provided that the terms and conditions of the Credit are complied with.

For the purposes of these Articles, branches of a bank in different countries are considered another bank.

Article 3

Credits v. Contracts

Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.

Article 4

Documents v. Goods/Services/Performance

In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

Article 5

Instructions to Issue/Amend Credits

Instructions for the issuance of a Credit, the Credit itself, instructions for an amendment thereto, and the amendment itself, must be complete and precise.

In order to guard against confusion and misunderstanding, banks should discourage any attempt:

- **i.** to include excessive detail in the Credit or in any amendment thereto;
- **ii.** to give instructions to issue, advise or confirm a Credit by reference to a Credit previously issued (similar Credit) where such previous Credit has been subject to accepted amendment(s), and/or unaccepted amendment(s).

All instructions for the issuance of a Credit and the Credit itself and, where applicable, all instructions for an amendment thereto and the amendment itself, must state precisely the document(s) against which payment, acceptance or negotiation is to be made.

B FORM AND NOTIFICATION OF CREDITS

Article 6

Revocable v. Irrevocable Credits

A Credit may be either

- **i.** revocable, **or**
- **ii.** irrevocable.

The Credit, therefore, should clearly indicate whether it is revocable or irrevocable.

In the absence of such indication the Credit shall be deemed to be irrevocable.

Article 7

Advising Bank's Liability

A Credit may be advised to a Beneficiary through another bank (the "Advising Bank") without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

If the Advising Bank cannot establish such apparent authenticity it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit.

Article 8

Revocation of a Credit

A revocable Credit may be amended or cancelled by the Issuing Bank at any moment and without prior notice to the Beneficiary.

However, the Issuing Bank must:

- **i.** reimburse another bank with which a revocable Credit has been made available for sight payment, acceptance or negotiation, for any payment, acceptance or negotiation made by such bank, prior to receipt by it of notice of amendment or cancellation, against documents which appear on their face to be in compliance with the terms and conditions of the Credit;
- **ii.** reimburse another bank with which a revocable Credit has been made available for deferred payment, if such a bank has, prior to receipt by it of notice of amendment or cancellation, taken up documents which appear on their face to be in compliance with the terms and conditions of the Credit.

Article 9

Liability of Issuing and Confirming Banks

a An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:

i. if the Credit provides for sight payment - to pay at sight;

ii. if the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;

iii. if the Credit provides for acceptance:

a. by the Issuing Bank - to accept Draft(s) drawn by the Beneficiary on the Issuing Bank and pay them at maturity, **or**

b. by another drawee bank - to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Issuing Bank in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;

iv. if the Credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional document(s).

b A confirmation of an irrevocable Credit by another bank (the "Confirming Bank") upon the authorisation or request of the Issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with:

i. if the Credit provides for sight payment - to pay at sight;

ii. if the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;

iii. if the Credit provides for acceptance:

a. by the Confirming Bank - to accept Draft(s) drawn by the Beneficiary on the Confirming Bank and pay them at maturity, **or**

b. by another drawee bank - to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Confirming Bank, in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;

iv. if the Credit provides for negotiation - to negotiate without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for a Draft(s) on the Applicant, banks will consider such Draft(s) as an additional document(s).

c **i.** If another bank is authorised or requested by the Issuing Bank to add its confirmation to a Credit but is not prepared to do so, it must so inform the Issuing Bank without delay.

ii. Unless the Issuing Bank specifies otherwise in its authorisation or request to add confirmation, the Advising Bank may advise the Credit to the Beneficiary without adding its confirmation.

d **i.** Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary.

ii. The Issuing Bank shall be irrevocably bound by an amendment(s) issued by it from the time of the issuance of such amendment(s). A Confirming Bank may extend its confirmation to an amendment and shall be irrevocably bound as of the time of its advice of the amendment. A Confirming Bank may, however, choose to advise an amendment to the beneficiary without extending its confirmation and if so, must inform the Issuing Bank and the Beneficiary without delay.

iii. The terms of the original Credit (or a Credit incorporating previously accepted amendment(s)) will remain in force for the Beneficiary until the Beneficiary communicates his acceptance of the amendment to the bank that advised such amendment. The Beneficiary should give notification of acceptance or rejection of amendment(s). If the Beneficiary fails to give such notification, the tender of documents to the Nominated Bank or Issuing Bank, that conform to the Credit and to not yet accepted amendment(s), will be deemed to be notification of acceptance by the Beneficiary of such amendment(s) and as of that moment the Credit will be amended.

iv. Partial acceptance of amendments contained in one and the same advice of amendment is not allowed and consequently will not be given any effect.

Article 10

Types of Credit

a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b **i.** Unless the Credit stipulates that it is available only with the Issuing Bank, all Credits must nominate the bank (the "Nominated Bank") which is authorised to pay, to incur a deferred payment undertaking, to accept Draft(s) or to negotiate. In a freely negotiable Credit, any bank is a Nominated Bank.

Presentation of documents must be made to the Issuing Bank or the Confirming Bank, if any, or any other Nominated Bank.

ii. Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

c Unless the Nominated Bank is the Confirming Bank, nomination by the Issuing Bank does not constitute any undertaking by the Nominated Bank to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate. Except where expressly agreed to by the Nominated Bank and so communicated to the Beneficiary, the Nominated Bank's receipt and/or examination and/or forwarding of the documents does not make that bank liable to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate.

d By nominating another bank, or by allowing for negotiation by any bank, or by authorising or requesting another bank to add its confirmation, the Issuing Bank authorises such bank to pay, accept Draft(s) or negotiate as the case may be, against documents which appear on their face to be in compliance with the terms and conditions of the Credit and undertakes to reimburse such bank in accordance with the provisions of these Articles.

Article 11

Teletransmitted and Pre-Advised Credits

a **i.** When an Issuing Bank instructs an Advising Bank by an authenticated teletransmission to advise a Credit or an amendment to a Credit, the teletransmission will be deemed to be the operative Credit instrument or the operative amendment, and no mail confirmation should be sent. Should a mail confirmation nevertheless be sent, it will have no effect and the Advising Bank will have no obligation to check such mail confirmation against the operative Credit instrument or the operative amendment received by teletransmission.

ii. If the teletransmission states "full details to follow" (or words of similar effect) or states that the mail confirmation is to be the operative Credit instrument or the operative amendment, then the teletransmission will not be deemed to be the operative Credit instrument or the operative amendment. The Issuing Bank must forward the operative Credit instrument or the operative amendment to such Advising Bank without delay.

b If a bank uses the services of an Advising Bank to have the Credit advised to the Beneficiary, it must also use the services of the same bank for advising an amendment(s).

c A preliminary advice of the issuance or amendment of an irrevocable Credit (pre-advice), shall only be given by an Issuing Bank if such bank is prepared to issue the operative Credit instrument or the operative amendment thereto. Unless otherwise stated in such preliminary advice by the Issuing Bank, an Issuing Bank having given such pre-advice shall be irrevocably committed to issue or amend the Credit, in terms not inconsistent with the pre-advice, without delay.

Article 12

Incomplete or Unclear Instructions

If incomplete or unclear instructions are received to advise, confirm or amend a Credit, the bank requested to act on such instructions may give preliminary notification to the Beneficiary for information only and without responsibility. This preliminary notification should state clearly that the notification is provided for information only and without the responsibility of the Advising Bank. In any event, the Advising Bank must inform the Issuing Bank of the action taken and request it to provide the necessary information.

The Issuing Bank must provide the necessary information without delay. The Credit will be advised, confirmed or amended, only when complete and clear instructions have been received and if the Advising Bank is then prepared to act on the instructions.

C LIABILITIES AND RESPONSIBILITIES

Article 13

Standard for Examination of Documents

a Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

b The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

c If a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.

Article 14

Discrepant Documents and Notice

a When the Issuing Bank authorises another bank to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate against documents which appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound:

i. to reimburse the Nominated Bank which has paid, incurred a deferred payment undertaking, accepted Draft(s), or negotiated,

ii. to take up the documents.

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b Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

c If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13 (b).

d **i.** If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.

ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.

iii. The Issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.

e If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

f If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.

Article 15

Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignor, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.

Article 16

Disclaimer on the Transmission of Messages

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation and/or interpretation of technical terms, and reserve the right to transmit Credit terms without translating them.

Article 17

Force Majeure

Banks assume no liability or responsibility for the consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts. Unless specifically authorised, banks will not, upon resumption of their business, pay, incur a deferred payment undertaking, accept Draft(s) or negotiate under Credits which expired during such interruption of their business.

Article 18

Disclaimer for Acts of an Instructed Party

a Banks utilizing the services of another bank or other banks for the purpose of giving effect to the instructions of the Applicant do so for the account and at the risk of such Applicant.

b Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).

c **i.** A party instructing another party to perform services is liable for any charges, including commissions, fees, costs or expenses incurred by the instructed party in connection with its instructions.

ii. Where a Credit stipulates that such charges are for the account of a party other than the instructing party, and charges cannot be collected, the instructing party remains ultimately liable for the payment thereof.

d The Applicant shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

Article 19

Bank-to-Bank Reimbursement Arrangements

a If an Issuing Bank intends that the reimbursement to which a paying, accepting or negotiating bank is entitled, shall be obtained by such bank (the "Claiming Bank"), claiming on another party (the "Reimbursing Bank"), it shall provide such Reimbursing Bank in good time with the proper instructions or authorisation to honour such reimbursement claims.

b Issuing Banks shall not require a Claiming Bank to supply a certificate of compliance with the terms and conditions of the Credit to the Reimbursing Bank.

c An Issuing Bank shall not be relieved from any of its obligations to provide reimbursement if and when reimbursement is not received by the Claiming Bank from the Reimbursing Bank.

d The Issuing Bank shall be responsible to the Claiming Bank for any loss of interest if reimbursement is not provided by the Reimbursing Bank on first demand, or as otherwise specified in the Credit, or mutually agreed, as the case may be.

e The Reimbursing Bank's charges should be for the account of the Issuing Bank. However, in cases where the charges are for the account of another party, it is the responsibility of the Issuing Bank to so indicate in the original Credit and in the reimbursement authorisation. In cases where the Reimbursing Bank's charges are for the account of another party they shall be collected from the Claiming Bank when the Credit is drawn under. In cases where the Credit is not drawn under, the Reimbursing Bank's charges remain the obligation of the Issuing Bank.

D DOCUMENTS

Article 20

Ambiguity as to the Issuers of Documents

a Terms such as "first class", "well known", "qualified", "independent", "official", "competent", "local" and the like, shall not be used to describe the issuers of any document(s) to be presented under a Credit. If such terms are incorporated in the Credit, banks will accept the relative document(s) as presented, provided that it appears on its face to be in compliance with the other terms and conditions of the Credit and not to have been issued by the Beneficiary.

b Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:

i. by reprographic, automated or computerized systems;

ii. as carbon copies;

provided that it is marked as original and, where necessary, appears to be signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

c **i.** Unless otherwise stipulated in the Credit, banks will accept as a copy(ies), a document(s) either labelled copy or not marked as an original - a copy(ies) need not be signed.

ii. Credits that require multiple document(s) such as "duplicate", "two fold", "two copies" and the like, will be satisfied by the presentation of one original and the remaining number in copies except where the document itself indicates otherwise.

d Unless otherwise stipulated in the Credit, a condition under a Credit calling for a document to be authenticated, validated, legalised, visaed, certified or indicating a similar requirement, will be satisfied by any signature, mark, stamp or label on such document that on its face appears to satisfy the above condition.

Article 21

Unspecified Issuers or Contents of Documents

When documents other than transport documents, insurance documents and commercial invoices are called for, the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented.

Article 22

Issuance Date of Documents v. Credit Date

Unless otherwise stipulated in the Credit, banks will accept a document bearing a date of issuance prior to that of the Credit, subject to such document being presented within the time limits set out in the Credit and in these Articles.

Article 23

Marine/Ocean Bill of Lading

a If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

the carrier or a named agent for or on behalf of the carrier, or

the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting, **and**

ii. indicates that the goods have been loaded on board, or shipped on a named vessel

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel", or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the bill of lading which, in addition to the date on which the goods have been loaded on board, also includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel".

If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading, **and**

iii. indicates the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it

a. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge, **and/or**

b. contains the indication "intended" or similar qualification in relation to the port of loading and/or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit, **and**

iv. consists of a sole original bill of lading or, if issued in more than one original, the full set as so issued, **and**

v. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the bill of lading (short form/blank back bill of lading); banks will not examine the contents of such terms and conditions, **and**

vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only, **and**

vii. in all other respects meets the stipulations of the Credit.

b For the purpose of this Article, transhipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

c Unless transhipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same bill of lading.

d Even if the Credit prohibits transhipment, banks will accept a bill of lading which:

i. indicates that transhipment will take place as long as the relevent cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading, **and/or**

ii. incorporates clauses stating that the carrier reserves the right to tranship.

Article 24
Non-Negotiable Sea Waybill

a If a Credit calls for a non-negotiable sea waybill covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

- the carrier or a named agent for or on behalf of the carrier, or

the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting, **and**

ii. indicates that the goods have been loaded on board, or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the non-negotiable sea waybill that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the non-negotiable sea waybill will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the non-negotiable sea waybill which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

If the non-negotiable sea waybill contains the indication "intended vessel", or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the non-negotiable sea waybill which, in addition to the date on which the goods have been loaded on board, includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel".

If the non-negotiable sea waybill indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on a vessel named in the non-negotiable sea waybill. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the non-negotiable sea waybill, **and**

iii. indicates the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it:

a. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge, **and/or**

b. contains the indication "intended" or similar qualification in relation to the port of loading and/or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit, **and**

iv. consists of a sole original non-negotiable sea waybill, or if issued in more than one original, the full set as so issued, **and**

v. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the non-negotiable sea waybill (short form/bank back non-negotiable sea waybill); banks will not examine the contents of such terms and conditions, **and**

vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only, **and**

vii. in all other respects meets the stipulations of the Credit.

b For the purpose of this Article, transhipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

c Unless transhipment is prohibited by the terms of the Credit, banks will accept a non-negotiable sea waybill which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same non-negotiable sea waybill.

d Even if the Credit prohibits transhipment, banks will accept a non-negotiable sea waybill which:

i. indicates that transhipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the non-negotiable sea waybill, provided that the entire ocean carriage is covered by one and the same non-negotiable sea waybill, **and/or**

ii. incorporates clauses stating that the carrier reserves the right to tranship.

Article 25
Charter Party Bill of Lading

a If a Credit calls for or permits a charter party bill of lading, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. contains any indication that it is subject to a charter party, **and**

ii. appears on its face to have been signed or otherwise authenticated by:

the master or a named agent for or on behalf of the master, or

the owner or a named agent for or on behalf of the owner.

Any signature or authentication of the master or owner must be identified as master or owner as the case may be. An agent signing or authenticating for the master or owner must also indicate the name and the capacity of the party, i.e. master or owner, on whose behalf that agent is acting, **and**

iii. does or does not indicate the name of the carrier, **and**

iv. indicates that the goods have been loaded on board or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment, **and**

v. indicates the port of loading and the port of discharge stipulated in the Credit, **and**

vi. consists of a sole original bill of lading or, if issued in more than one original, the full set as so issued, **and**

vii. contains no indication that the carrying vessel is propelled by sail only, **and**

viii. in all other respects meets the stipulations of the Credit.

b Even if the Credit requires the presentation of a charter party contract in connection with a charter party bill of lading, banks will not examine such charter party contract, but will pass it on without responsibility on their part.

Article 26
Multimodal Transport Document

a If a Credit calls for a transport document covering at least two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by:

the carrier or multimodal transport operator or a named agent for or on behalf of the carrier or multimodal transport operator, or

the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier, multimodal transport operator or master must be identified as carrier, multimodal transport operator or master, as the case may be. An agent signing or authenticating for the carrier, multimodal transport operator or master must also indicate the name and the capacity of the party, i.e. carrier, multimodal transport operator or master, on whose behalf that agent is acting, **and**

ii. indicates that the goods have been dispatched, taken in charge or loaded on board.

Dispatch, taking in charge or loading on board may be indicated by wording to that effect on the multimodal transport document and the date of issuance will be deemed to be the date of dispatch, taking in charge or loading on board and the date of shipment. However, if the document indicates, by stamp or otherwise, a date of dispatch, taking in charge or loading on board, such date will be deemed to be the date of shipment, **and**

iii. a. indicates the place of taking in charge stipulated in the Credit which may be different from the port, airport or place of loading, and the place of final destination stipulated in the Credit which may be different from the port, airport or place of discharge, **and/or**

b. contains the indication "intended" or similar qualification in relation to the vessel and/or port of loading and/or port of discharge, **and**

iv. consists of a sole original multimodal transport document or, if issued in more than one original, the full set as so issued, **and**

v. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the multimodal transport document (short form/blank back multimodal transport document); banks will not examine the contents of such terms and conditions, **and**

vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only, **and**

vii. in all other respects meets the stipulations of the Credit.

b Even if the Credit prohibits transhipment, banks will accept a multimodal transport document which indicates that transhipment will or may take place, provided that the entire carriage is covered by one and the same multimodal transport document.

Article 27
Air Transport Document

a If a Credit calls for an air transport document, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

the carrier, or

a named agent for or on behalf of the carrier.

Any signature or authentication of the carrier must be identified as carrier. An agent signing or authenticating for the carrier must also indicate the name and the capacity of the party, i.e. carrier, on whose behalf that agent is acting, **and**

ii. indicates that the goods have been accepted for carriage, **and**

iii. where the Credit calls for an actual date of dispatch, indicates a specific notation of such date, the date of dispatch so indicated on the air transport document will be deemed to be the date of shipment.

For the purpose of this Article, the information appearing in the box on the air transport document (marked "For Carrier Use Only" or similar expression) relative to the flight number and date will not be considered as a specific notation of such date of dispatch.

In all other cases, the date of issuance of the air transport document will be deemed to be the date of shipment, **and**

iv. indicates the airport of departure and the airport of destination stipulated in the Credit, **and**

v. appears to be the original for consignor/shipper even if the Credit stipulates a full set of originals, or similar expressions, **and**

vi. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions, by reference to a source or document other than the air transport document; and banks will not examine the contents of such terms and conditions, **and**

vii. in all other respects meets the stipulations of the Credit.

b For the purpose of this Article, transhipment means unloading and reloading from one aircraft to another aircraft during the course of carriage from the airport of departure to the airport of destination stipulated in the Credit.

c Even if the Credit prohibits transhipment, banks will accept an air transport document which indicates that transhipment will or may take place, provided that the entire carriage is covered by one and the same air transport document.

Article 28
Road, Rail or Inland Waterway Transport Documents

a If a Credit calls for a road, rail, or inland waterway transport document, banks will, unless otherwise stipulated in the Credit, accept a document of the type called for, however named, which:

i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by the carrier or a named agent for or on behalf of the carrier and/or to bear a reception stamp or other indication of receipt by the carrier or a named agent for or on behalf of the carrier.

Any signature, authentication, reception stamp or other indication of receipt of the carrier, must be identified on its face as that of the carrier. An agent signing or authenticating for the carrier must also indicate the name and the capacity of the party, i.e. carrier, on whose behalf that agent is acting, **and**

ii. indicates that the goods have been received for shipment, dispatch or carriage or wording to this effect. The date of issuance will be deemed to be the date of shipment unless the transport document contains a reception stamp, in which case the date of the reception stamp will be deemed to be the date of shipment, **and**

iii. indicates the place of shipment and the place of destination stipulated in the Credit, **and**

iv. in all other respects meets the stipulations of the Credit.

b In the absence of any indication on the transport document as to the numbers issued, banks will accept the transport document(s) presented as constituting a full set. Banks will accept as original(s) the transport document(s) whether marked as original(s) or not.

c For the purpose of this Article, transhipment means unloading and reloading from one means of conveyance to another means of conveyance, in different modes of transport, during the course of carriage from the place of shipment to the place of destination stipulated in the Credit.

d Even if the Credit prohibits transhipment, banks will accept a road, rail, or inland waterway transport document which indicates that transhipment will or may take place, provided that the entire carriage is covered by one and the same transport document and within the same mode of transport.

Article 29
Courier and Post Receipts

a If the Credit calls for a post receipt or certificate of posting, banks will, unless otherwise stipulated in the Credit, accept a post receipt or certificate of posting which:

i. appears on its face to have been stamped or otherwise authenticated and dated in the place from which the Credit stipulates the goods are to be shipped or dispatched and such date will be deemed to be the date of shipment or dispatch, **and**

ii. in all other respects meets the stipulations of the Credit.

b If the Credit calls for a document issued by a courier or expedited delivery service evidencing receipt of the goods for delivery, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the courier/service, and to have been stamped, signed or otherwise authenticated by such named courier/service (unless the Credit specifically calls for a document issued by a named Courier/Service, banks will accept a document issued by any Courier/Service), **and**

ii. indicates a date of pick-up or of receipt or wording to this effect, such date being deemed to be the date of shipment or dispatch, **and**

iii. in all other respects meets the stipulations of the Credit.

Article 30
Transport Documents issued by Freight Forwarders

Unless otherwise authorised in the Credit, banks will only accept a transport document issued by a freight forwarder if it appears on its face to indicate:

i. the name of the freight forwarder as a carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as carrier or multimodal transport operator, **or**

ii. the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as a named agent for or on behalf of the carrier or multimodal transport operator.

Article 31
"On Deck", "Shipper's Load and Count", Name of Consignor

Unless otherwise stipulated in the Credit, banks will accept a transport document which:

i. does not indicate, in the case of carriage by sea or by more than one means of conveyance including carriage by sea, that the goods are or will be loaded on deck. Nevertheless, banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck, **and/or**

ii. bears a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect, **and/or**

iii. indicates as the consignor of the goods a party other than the Beneficiary of the Credit.

Article 32

Clean Transport Documents

a A clean transport document is one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging.

b Banks will not accept transport documents bearing such clauses or notations unless the Credit expressly stipulates the clauses or notations which may be accepted.

c Banks will regard a requirement in a Credit for a transport document to bear the clause "clean on board" as complied with if such transport document meets the requirements of this Article and of Articles 23, 24, 25, 26, 27, 28 or 30.

Article 33

Freight Payable/Prepaid Transport Documents

a Unless otherwise stipulated in the Credit, or inconsistent with any of the documents presented under the Credit, banks will accept transport documents stating that freight or transportation charges (hereafter referred to as the "freight") have still to be paid.

b If a Credit stipulates that the transport document has to indicate that freight has been paid or prepaid, banks will accept a transport document on which words clearly indicating payment or prepayment of freight appear by stamp or otherwise, or on which payment or prepayment of freight is indicated by other means. If the Credit requires courier charges to be paid or prepaid banks will also accept a transport document issued by a courier or expedited delivery service evidencing that courier charges are for the account of a party other than the consignee.

c The words "freight prepayable" or "freight to be prepaid" or words of similar effect, if appearing on transport documents, will not be accepted as constituting evidence of the payment of freight.

d Banks will accept transport documents bearing reference by stamp or otherwise to costs additional to the freight, such as costs of, or disbursements incurred in connection with, loading, unloading or similar operations, unless the conditions of the Credit specifically prohibit such reference.

Article 34

Insurance Documents

a Insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents.

b If the insurance document indicates that it has been issued in more than one original, all the originals must be presented unless otherwise authorised in the Credit.

c Cover notes issued by brokers will not be accepted, unless specifically authorised in the Credit.

d Unless otherwise stipulated in the Credit, banks will accept an insurance certificate or a declaration under an open cover pre-signed by insurance companies or underwriters or their agents. If a Credit specifically calls for an insurance certificate or a declaration under an open cover, banks will accept, in lieu thereof, an insurance policy.

e Unless otherwise stipulated in the Credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.

f **i.** Unless otherwise stipulated in the Credit, the insurance document must be expressed in the same currency as the Credit.

ii. Unless otherwise stipulated in the Credit, the minimum amount for which the insurance document must indicate the insurance cover to have been effected is the CIF (cost, insurance and freight (... named port of destination)) or CIP (carriage and insurance paid to (... named place of destination)) value of the goods, as the case may be, plus 10%, but only when the CIF or CIP value can be determined from the documents on their face. Otherwise, banks will accept as such minimum amount 110% of the amount for which payment, acceptance or negotiation is requested under the Credit, or 110% of the gross amount of the invoice, whichever is the greater.

Article 35

Type of Insurance Cover

a Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used; if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

b Failing specific stipulations in the Credit, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

c Unless otherwise stipulated in the Credit, banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible).

Article 36

All Risk Insurance Cover

Where a Credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if the insurance document indicates that certain risks are excluded, without responsibility for any risk(s) not being covered.

Article 37

Commercial Invoices

a Unless otherwise stipulated in the Credit, commercial invoices;

i. must appear on their face to be issued by the Beneficiary named in the Credit (except as provided in Article 48), **and**

ii. must be made out in the name of the Applicant (except as provided in sub-Article 48 (h)), **and**

iii. need not be signed.

b Unless otherwise stipulated in the Credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the Credit. Nevertheless, if a bank authorised to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate under a Credit accepts such invoices, its decision will be binding upon all parties, provided that such bank has not paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated for an amount in excess of that permitted by the Credit.

c The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.

Article 38

Other Documents

If a Credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight which appears to have been superimposed on the transport document by the carrier or his agent unless the Credit specifically stipulates that the attestation or certification of weight must be by means of a separate document.

E MISCELLANEOUS PROVISIONS

Article 39

Allowances in Credit Amount, Quantity and Unit Price

a The words "about", "approximately", "circa" or similar expressions used in connection with the amount of the Credit or the quantity or the unit price stated in the Credit are to be construed as allowing a difference not to exceed 10% more or 10% less than the amount or the quantity or the unit price to which they refer.

b Unless a Credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 5% more or 5% less will be permissible, always provided that the amount of the drawings does not exceed the amount of the Credit. This tolerance does not apply when the Credit stipulates the quantity in terms of a stated number of packing units or individual items.

c Unless a Credit which prohibits partial shipments stipulates otherwise, or unless sub-Article (b) above is applicable, a tolerance of 5% less in the amount of the drawing will be permissible, provided that if the Credit stipulates the quantity of the goods, such quantity of goods is shipped in full, and if the Credit stipulates a unit price, such price is not reduced. This provision does not apply when expressions referred to in sub-Article (a) above are used in the Credit.

Article 40

Partial Shipments/Drawings

a Partial drawings and/or shipments are allowed, unless the Credit stipulates otherwise.

b Transport documents which appear on their face to indicate that shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment and/or different ports of loading, places of taking in charge or despatch.

c Shipments made by post or by courier will not be regarded as partial shipments if the post receipts or certificates of posting or courier's receipts or dispatch notes appear to have been stamped, signed or otherwise authenticated in the place from which the Credit stipulates the goods are to be dispatched, and on the same date.

Article 41

Instalment Shipments/Drawings

If drawings and/or shipments by instalments within given periods are stipulated in the Credit and any instalment is not drawn and/or shipped within the period allowed for that instalment, the Credit ceases to be available for that and any subsequent instalments, unless otherwise stipulated in the Credit.

ARTICLE 42

Expiry Date and Place for Presentation of Documents

a All Credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable Credits, a place for presentation of documents for negotiation. An expiry date stipulated for payment, acceptance or negotiation will be construed to express an expiry date for presentation of documents.

b Except as provided in sub-Article 44(a), documents must be presented on or before such expiry date.

c If an Issuing Bank states that the Credit is to be available "for one month", "for six months", or the like, but does not specify the date from which the time is to run, the date of issuance of the Credit by the Issuing Bank will be deemed to be the first day from which such time is to run. Banks should discourage indication of the expiry date of the Credit in this manner.

ARTICLE 43

Limitation on the Expiry Date

a In addition to stipulating an expiry date for presentation of documents, every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the Credit.

b In cases in which sub-Article 40(b) applies, the date of shipment will be considered to be the latest shipment date on any of the transport documents presented.

ARTICLE 44

Extension of Expiry Date

a If the expiry date of the Credit and/or the last day of the period of time for presentation of documents stipulated by the Credit or applicable by virtue of Article 43 falls on a day on which the bank to which presentation has to be made is closed for reasons other than those referred to in Article 17, the stipulated expiry date and/or the last day of the period of time after the date of shipment for presentation of documents, as the case may be, shall be extended to the first following day on which such bank is open.

b The latest date for shipment shall not be extended by reason of the extension of the expiry date and/or the period of time after the date of shipment for presentation of documents in accordance with sub-Article (a) above. If no such latest date for shipment is stipulated in the Credit or amendments thereto, banks will not accept transport documents indicating a date of shipment later than the expiry date stipulated in the Credit or amendments thereto.

c The bank to which presentation is made on such first following business day must provide a statement that the documents were presented within the time limits extended in accordance with sub-Article 44(a) of the Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500.

ARTICLE 45

Hours of Presentation

Banks are under no obligation to accept presentation of documents outside their banking hours.

ARTICLE 46

General Expressions as to Dates

a Unless otherwise stipulated in the Credit, the expression "shipment" used in stipulating an earliest and/or a latest date for shipment will be understood to include the expressions such as "loading on board", "dispatch", "accepted for carriage", "date of post receipt", "date of pick-up", and the like, and in the case of a Credit calling for a multimodal transport document the expression "taking in charge".

b Expressions such as "prompt", "immediately", "as soon as possible", and the like should not be used. If they are used banks will disregard them.

c If the expression "on or about" and similar expressions are used, banks will interpret them as a stipulation that shipment is to be made during the period from five days before to five days after the specified date, both end days included.

ARTICLE 47

Date Terminology for Periods of Shipment

a The words "to", "until", "till", "from" and words of similar import applying to any date or period in the Credit referring to shipment will be understood to include the date mentioned.

b The word "after" will be understood to exclude the date mentioned.

c The terms "first half", "second half" of a month shall be construed respectively as the 1st to the 15th, and the 16th to the last day of such month, all dates inclusive.

d The terms "beginning", "middle", or "end" of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of such month, all dates inclusive.

F TRANSFERABLE CREDIT

ARTICLE 48

Transferable Credit

a A transferable Credit is a Credit under which the Beneficiary (First Beneficiary) may request the bank authorised to pay, incur a deferred payment undertaking, accept or negotiate (the "Transferring Bank"), or in the case of a freely negotiable Credit, the bank specifically authorised in the Credit as a Transferring Bank, to make the Credit available in whole or in part to one or more other Beneficiary(ies) (Second Beneficiary(ies)).

b A Credit can be transferred only if it is expressly designated as "transferable" by the Issuing Bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" do not render the Credit transferable. If such terms are used they shall be disregarded.

c The Transferring Bank shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank.

d At the time of making a request for transfer and prior to transfer of the Credit, the First Beneficiary must irrevocably instruct the Transferring Bank whether or not he retains the right to refuse to allow the Transferring Bank to advise amendments to the Second Beneficiary(ies). If the Transferring Bank consents to the transfer under these conditions, it must, at the time of transfer, advise the Second Beneficiary(ies) of the First Beneficiary's instructions regarding amendments.

e If a Credit is transferred to more than one Second Beneficiary(ies), refusal of an amendment by one or more Second Beneficiary(ies) does not invalidate the acceptance(s) by the other Second Beneficiary(ies) with respect to whom the Credit will be amended accordingly. With respect to the Second Beneficiary(ies) who rejected the amendment, the Credit will remain unamended.

f Transferring Bank charges in respect of transfers including commissions, fees, costs or expenses are payable by the First Beneficiary, unless otherwise agreed. If the Transferring Bank agrees to transfer the Credit it shall be under no obligation to effect the transfer until such charges are paid.

g Unless otherwise stated in the Credit, a transferable Credit can be transferred once only. Consequently, the Credit cannot be transferred at the request of the Second Beneficiary to any subsequent Third Beneficiary. For the purpose of this Article, a retransfer to the First Beneficiary does not constitute a prohibited transfer.

Fractions of a transferable Credit (not exceeding in the aggregate the amount of the Credit) can be transferred separately, provided partial shipments/drawings are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the Credit.

h The Credit can be transferred only on the terms and conditions specified in the original Credit, with the exception of:

- the amount of the Credit,
- any unit price stated therein,
- the expiry date,
- the last date for presentation of documents in accordance with Article 43,
- the period for shipment,

any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased in such a way as to provide the amount of cover stipulated in the original Credit, or these Articles.

In addition, the name of the First Beneficiary can be substituted for that of the Applicant, but if the name of the Applicant is specifically required by the original Credit to appear in any document(s) other than the invoice, such requirement must be fulfilled.

i The First Beneficiary has the right to substitute his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies), for amounts not in excess of the original amount stipulated in the Credit and for the original unit prices if stipulated in the Credit, and upon such substitution of invoice(s) (and Draft(s)) the First Beneficiary can draw under the Credit for the difference, if any, between his invoice(s) and the Second Beneficiary's(ies') invoice(s).

When a Credit has been transferred and the First Beneficiary is to supply his own invoice(s) (and Draft(s)) in exchange for the Second Beneficiary's(ies') invoice(s) (and Draft(s)) but fails to do so on first demand, the Transferring Bank has the right to deliver to the Issuing Bank the documents received under the transferred Credit, including the Second Beneficiary's(ies') invoice(s) (and Draft(s)) without further responsibility to the First Beneficiary.

j The First Beneficiary may request that payment or negotiation be effected to the Second Beneficiary(ies) at the place to which the Credit has been transferred up to and including the expiry date of the Credit, unless the original Credit expressly states that it may not be made available for payment or negotiation at a place other than that stipulated in the Credit. This is without prejudice to the First Beneficiary's right to substitute subsequently his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies) and to claim any difference due to him.

G ASSIGNMENT OF PROCEEDS

Article 49

Assignment of Proceeds

The fact that a Credit is not stated to be transferable shall not affect the Beneficiary's right to assign any proceeds to which he may be, or may become, entitled under such Credit, in accordance with the provisions of the applicable law. This Article relates only to the assignment of proceeds and not to the assignment of the right to perform under the Credit itself.

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U.S. GUIDELINES AND PROCEDURES GOVERNING BANK-TO-BANK REIMBURSEMENTS UNDER LETTERS OF CREDIT

A Bank-to-Bank Reimbursement transaction is not in itself a letter of credit but facilitates letter of credit transactions. If the Issuing Bank does not have a correspondent relationship or does not hold an account with the bank that has been authorized to pay, accept or negotiate, the Bank-to-Bank Reimbursement transaction offers a means of prompt reimbursement thereby facilitating the letter of credit transaction for all the concerned parties.

Recognizing the need for guidelines and procedures among U.S. Banks processing bank-to-bank reimbursements, the National Association of Councils on International Banking published in 1981, "U.S. PRACTICES AND PROCEDURES GOVERNING BANK-TO-BANK REIMBURSEMENTS UNDER LETTERS OF CREDIT." The National Association of Councils on International Banking was dissolved in 1988 and replaced by the U.S. Council on International Banking, Inc. (USCIB) which organization represents the interests of member banking organizations in the United States and its territories with regard to matters affecting their international operations.

It is the spirit of these guidelines that reimbursement procedures should be as simple as possible, lending themselves to automation or other means of processing these transactions quickly and with minimum expense for all parties involved.

The procedures detailed in each article, for use by all banks who are engaged in processing bank-to bank reimbursements, were adopted by the U.S. Council on International Banking, Inc. (USCIB) on February 22, 1990.

It is suggested to USCIB Member Banks that these guidelines and procedures be incorporated in their terms and conditions to make correspondent banks aware of how bank-to-bank reimbursements will be processed and the responsibilities of the respective parties.

As these guidelines and procedures are silent regarding the authentication of claims by Reimbursing Banks, it is suggested that member banks who will only act on authenticated claims make their correspondents aware of that fact to avoid problems when unauthenticated claims are received.

The publication of these guidelines and procedures and their widespread circulation among banks involved in the letter of credit transaction and the bank-to-bank reimbursement procedure, will help all parties involved to have a clearer understanding of the reimbursement process and, equally important, the responsibility of the respective parties

U.S. COUNCIL ON INTERNATIONAL
BANKING, INC.

Article 1–DEFINITIONS

As used herein, the following terms shall have the meanings herein specified.

a. "Issuing Bank" shall mean the bank who has issued a Reimbursement Authorization under its letter of credit.

b. "Reimbursing Bank" shall mean the bank authorized to effect reimbursement pursuant to a Reimbursement Authorization issued by the Issuing Bank.

c. "Claiming Bank" shall mean the bank negotiating/paying or accepting drafts under a letter of credit and claiming reimbursement from the Reimbursing Bank under the Reimbursement Authorization issued by the Issuing Bank.

d. "Reimbursement Authorization" shall mean an authorization, separate from the letter of credit, issued by an Issuing Bank to a Reimbursing Bank, either (1) to reimburse a Claiming Bank for a negotiation or payment (which includes deferred payment or payment of a matured acceptance created by the Claiming Bank) made under the Issuing Bank's Letter of Credit, or (2) to accept a time draft drawn on the Reimbursing Bank.

e. "Confirmed Reimbursement" shall mean a separate irrevocable undertaking of the Reimbursing Bank, issued at the request of the Issuing Bank, to a bank nominated in the Reimbursement Authorization to honor their claim(s) under such undertaking provided that the terms of said undertaking have been complied with.

Article 2–APPLICATION

The procedures detailed in these articles apply to all Reimbursement Authorizations received by member banks of the U.S. Council on International Banking Inc. ("USCIB"), unless otherwise expressly agreed to by the Reimbursing Bank.

Article 3–FORM AND NOTIFICATION OF AUTHORIZATION AND AMENDMENTS THERETO

a. The Issuing Bank's authorization to the Reimbursing Bank, as well as any amendments thereto, must be in the form of an original signed letter or authenticated teletransmission addressed to the Reimbursing Bank indicating the letter of credit number, and in the case of an authorization the currency and the maximum amount available for Reimbursement or, in the case of an amendment the relevant change to the authorization. A copy of the letter of credit or amendment thereto containing full details must not be sent to the Reimbursing Bank.

b. When a letter of credit or amendment thereto is issued by teletransmission, the Issuing Bank must also advise its authorization or relevant amendment to the authorization, to the Reimbursing Bank by authenticated teletransmission and such teletransmission will be considered the operative authorization and mail confirmation must not be sent.

c. Reimbursing Banks shall not be responsible for the consequences resulting from the non-payment or delay in payment of claims for which it may have received no Reimbursement Authorization or amendment or for which the above instructions are not followed.

Article 4–VALIDITY OF A REIMBURSEMENT AUTHORIZATION

As a Reimbursement Authorization (the "authorization") is a separate instruction from the letter of credit on which it is based, Reimbursing Banks are not concerned with or bound by the terms and conditions of the letter of credit.

Therefore, while the letter of credit must have an expiry date, the Authorization should not have an "expiry date", except as indicated in Article 5 herein. Reimbursing Banks will assume no responsibility for expiry dates of Authorizations unless and to the extent expressly agreed to by them.

Reimbursing Banks will assume no responsibility for the expiry date of the letter of credit.

Article 5–CONFIRMED REIMBURSEMENTS

a. A Reimbursing Bank is not obligated to honor claims made under a Reimbursement Authorization unless, and to the extent that, at the request of the Issuing Bank, it has given its irrevocable undertaking to a nominated Claiming Bank that the latter's claims will be honored.

b. In its irrevocable undertaking to a nominated Claiming Bank, the Reimbursing Bank must indicate the terms of the undertaking including the maximum amount of claims that are to be honored and an expiry date for the receipt of claims by the Reimbursing Bank. If any charges inconnection with the Reimbursing Bank's undertaking will be deducted from the amount reimbursed, then the Reimbursing Bank must so indicate the amount of such charges in their undertaking to the nominated Claiming Bank.

c. Such undertaking can neither be amended nor cancelled without the agreement of the Reimbursing Bank and the nominated Claiming Bank to which the undertaking has been issued.

Article 6–PROCESSING CLAIMS

a. Reimbursing Banks have a reasonable time to honor claims made to them by the Claiming Bank. In the event that the Reimbursing Bank receives a claim which it is not prepared to honor, for any reason whatsoever, the Reimbursing Bank should give notice to the Claiming Bank and the Issuing Bank by telecommunications or other expeditious means, that it is not honoring the claim. Such notice should be sent by the close of the fifth banking day following receipt of the claim.

b. Reimbursing Banks will not honor requests for back value or value dating prior to the date of their settlement of a reimbursement claim unless expressly agreed to by them.

c. If a claim is made by teletransmission no mail confirmation is to be sent. In the event such a mail confirmation is sent, the Claiming Bank will be responsible for any consequences which may arise from a duplicate payment.

Article 7–PREDETERMINED PAYMENT DATES

Reimbursement claims payable on a predetermined date may be returned by the Reimbursing Bank, by the same channel of communications by which it was received, if received 10 or more days prior to such predetermined date.

Article 8–CHARGES

a. Unless otherwise stated in a Reimbursement Authorization, all charges of the Reimbursing Bank will be for the Issuing Bank's account.

b. Unless otherwise stated in a Reimbursement Authorization, all charges of the Claiming Bank will be for the Issuing Bank's account.

c. Unless otherwise stated in a Reimbursement Authorization, all charges referred to in a. and b. of this article will be paid by the Reimbursing Bank in addition to the amount of the Authorization.

d. In the event that a Reimbursement Authorization specifically states that the Claiming Bank's charges are not payable under such Authorization or that the Reimbursing Bank's charges are for the account of the Claiming Bank, Issuing Banks must ensure that such instructions are included as part of the reimbursement instructions contained in the letter of credit.

e. Reimbursing Banks will not be responsible for any consequences arising due to non-payment of the Claiming Bank's charges or for the deduction of the Reimbursing Bank's charges in the event the Issuing Bank has failed to follow the instructions in this article.

f. In the event that the Reimbursing Bank is unable to collect its charges from the Claiming Bank due to non-utilization of the Reimbursement Authorization by a Claiming Bank, then the Reimbursing Bank will recover its charges from the Issuing Bank.

Article 9–SIGHT CLAIMS

a. The Claiming Bank's claim for reimbursement must be in the form of an original letter or teletransmission. A copy of the Claiming Bank's advice of payment, acceptance, negotiation or deferred payment to the Issuing Bank must not be used as a reimbursement claim and, if so used, the Claiming Bank will be responsible if it is not acted upon by the Reimbursing Bank.

b. Claims received via teletransmission will be honored unless expressly prohibited by the Reimbursement Authorization. Issuing Banks must ensure that such a prohibition in a Reimbursement Authorization be clearly specified in the underlying letter of credit.

c. Reimbursing Banks will not be responsible for any consequences which may arise as a result of non-payment or delay in payment of claims for which the instructions in this article are not followed.

d As Reimbursing Banks are reimbursing agents only, and not a party to the underlying letter of credit, and therefore not responsible for the examination of documents, Issuing Banks must not require sight drafts to be drawn on the Reimbursing Bank. In the event that the Issuing Bank requires sight drafts to be drawn on the Reimbursing Bank, a Reimbursing Bank may charge the Issuing Bank a documentary examination fee.

Article 10–ACCEPTANCES

a. In the event an Issuing Bank issues its letter of credit calling for a time draft on the Reimbursing Bank and instructs the Reimbursing Bank to accept such time draft for the account of the Issuing Bank, the Issuing Bank must instruct the Claiming Bank to forward the draft to the Reimbursing Bank for acceptance together with a

general description of the merchandise, the date of loading on board, dispatch or taking in charge (shipment) of the merchandise, the point of shipment and the point of destination.

b. The Reimbursing Bank will not be responsible for any consequences which may arise as a result of the failure to receive the information required in this article.

Article 11–PAYMENT ORDERS

An Issuing Bank which has issued a Reimbursement Authorization to a Reimbursing Bank must not, upon receipt of documents from a presenter, give instructions to the Reimbursing Bank to effect payment. If instructions are given they may be processed by the Reimbursing Bank as a payment order and may result in a duplication of the payment in the event the Claiming Bank requests payment from the Reimbursing Bank. In the event of duplication of payment under the foregoing circumstances, it is the responsibility of the Issuing Bank to obtain the return of the duplicated amount from the Claiming Bank plus interest and charges, if applicable. The Reimbursing Bank will not be responsible for any consequences which may arise from such duplication.

Article 12–MULTIPLE PAYMENTS

Reimbursing Banks will not be required to make multiple payments under a single claim nor to make payment to or for an account other than that of the Claiming Bank.

Article 13–LIABILITY AND RESPONSIBILITY

a. Reimbursing Banks assume no liability or responsibility for consequences arising out of delay and/or loss in transit of any messages, letters or documents, or for delay, mutilation or other errors arising from any teletransmission.

b. Reimbursing Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotion, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts.

c. Reimbursing Banks assume no liability or responsibility if a claim indicates that a negotiation/payment/acceptance was made against a reserve or an indemnity or a guarantee. Such reserve, indemnity or guarantee concerns only the relations between Claiming Bank and the party towards whom the reserve was made or from whom, or on whose behalf, the indemnity or guarantee was issued.

Article 14–CERTIFICATE OF COMPLIANCE

As Reimbursing Banks are reimbursing agents only, not a party to the underlying letter of credit and therefore not responsible for the examination of documents. Issuing Banks must not require a Claiming Bank to supply a certificate of compliance to the Reimbursing Bank. In the event that the Issuing Bank requires a Claiming Bank to supply a certificate of compliance, a Reimbursing Bank may charge the Issuing Bank a documentary examination fee.

Article 15–RESTRICTING CLAIMS

a. If payment of reimbursement claims are to be restricted to a particular Claiming Bank(s) such restriction must be expressly stated in the Reimbursement Authorization. Issuing Banks must ensure that such instructions are included in the letter of credit.

b. Only the expressions "available with" and "negotiations restricted to" will be considered as expressly restricting payment to the bank(s) named in the Reimbursement Authorization.

October 20, 1993

The Honorable Lee Hamilton, Chairman
Committee on Foreign Affairs
Room 2170 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515-6128

Dear Mr. Chairman:

We are the U.S. companies that support S.1119, the "Secured Payment Act". We are concerned that your public comments indicate that you have been misinformed as to who we are and what we are trying to accomplish.

First, we are not a cabal of large corporations with large legal staffs. Attached is a list of the companies involved with details about each.

We have requested licenses for approximately $20 million of payments due us that have been improperly frozen. Of this amount, $6.4 million has already been set aside in escrow as a result of a court ruling. This leaves $14 million of funds belonging to U.S. companies commingled with the estimated $1.2 billion of Iraqi assets.

Three of the companies are wholly owned subsidiaries of larger U.S. corporations. Each subsidiary must meet projected earnings goals independent of the corporate parent. In business, the corporate parent does not simply write a check to cover a deficit for the subsidiary.

These businesses are not nameless, faceless entities. We are entrepreneurs who employ people -- individuals -- your constituents. Unlike the federal government, we can't operate at a deficit. If we have a loss we have to cut costs. Unfortunately, when the losses are this large, we must cut jobs.

We do not dispute the power of the President to freeze Iraqi assets. However, OFAC has improperly administered the freeze by failing to separate funds belonging to U.S. companies from those belonging to Iraq. The Iraqis deposited money in U.S. bank accounts to pay for goods that we shipped to them prior to the freeze. Once we performed the conditions specified by the letters of credit, the funds became ours and should not have been included in the freeze on Iraqi assets. Iraq has no claim to the money.

The basic rule of letter of credit law is that banks that issue or confirm letters of credit undertake an obligation to pay the letter of credit beneficiary upon presentation of certain documents as specified in the letter of credit. Treasury has recognized this principle in its Iraqi Sanctions Regulations S575.510, which authorizes Treasury to issue licenses in cases where goods were shipped before the Gulf War based on letters of credit issued or confirmed by U.S. banks. The exporters in those cases were paid, and so were the issuing or confirming banks.

The remedy we are seeking is patterned after Treasury's regulation S575.510, and entirely consistent with that regulation and letter-of-credit law. Treasury has drawn a line that recognizes the right to payment from blocked Iraqi funds in cases where goods were shipped before the Gulf War based on letters of credit issued or confirmed by U.S. banks, but refuses the right to payment in cases based on the same facts but one -- the nationality of the issuing or confirming bank. There is no legal justification for this distinction.

Our proposed remedy would simply treat U.S. exporters the same way Treasury has already treated U.S. banks. It is no more a "piecemeal approach," to use the words of OFAC Director Richard Newcomb, than the policy Treasury has already adopted.

There are reports that OFAC has released $100 million of frozen Iraqi funds to U.S. banks. The total value of the funds that we are seeking to recover is a fraction of that amount. OFAC has suggested that the amount of money we are seeking might drain the pool of frozen assets. Only OFAC knows if there are other similarly situated persons -- those with irrevocable letters of credit that shipped prior to the embargo -- based on license applications. Yet OFAC has never told Congress how much money is at stake. Again, we are seeking approximately $20 million.

Mr. Newcomb argued in his testimony before the Foreign Affairs Committee on October 13, 1993 that we are seeking a right to repayment based on performance of the trade contract instead of compliance with letter of credit terms; and that we are seeking a right to payment from any funds of the foreign bank that issued the letter of credit instead of from the account specified in the letter of credit.

Our intention is simply to remove the Iraqi assets freeze as an obstacle to us in seeking payment of our letters of credit. The simplest way for this to happen is for OFAC to issue us licenses, just as OFAC has issued licenses to U.S. banks. With licenses in hand, our commercial transactions could proceed routinely. We wouldn't expect the issuing or confirming bank to pay if we had not met the conditions of the letters of credit. Nor would we expect the issuing or confirming bank to pay the letter of credit except according to its terms, including its terms describing the account from which payment is specified. Of course, as in a normal commercial situation, if the letter of credit does not identify a specific account (i.e. if the letter of credit calls for payment "from our account credit at first class U.S. bank"), the U.S. bank could seek payment instructions from the foreign bank.

Congress should recognize that U.S. companies that shipped goods to Iraq before the Gulf War, or otherwise satisfied the terms of their letters of credit, are entitled to seek payment from the U.S. bank accounts of the Iraqi banks that issued the letters of credit. The money to pay those letters of credit belongs to the U.S. exporters as a matter of right. We did everything we were required to do. We fully performed our obligations under the letters of credit. The Iraqi buyers of our products received their goods more than three years ago, and still we haven't been paid. This has caused immeasurable hardship and unreasonable expense. Please bring to a close this sad chapter in the treatment of U.S. companies at the hands of the U.S. government by requiring the Treasury Department to stand aside give us the right to collect our money without interference from OFAC. Please direct OFAC to grant us licenses.

Mr. Chairman, we thank you for holding this hearing and giving us an opportunity to explain our problem to the Committee.

Sincerely,

Anthony Lewis
President, Klein-Berger

Mario Messina
Messina Incorporated

Fanar Alghrary
Trading and Investment Corporation

Albert C. Monk, III
Monk-Austin

Claude Owen
Dibrell Brothers

Raymond Roberts
Consarc

Messina Incorporated 4514 Travis Street Suite 240, LB3 Dallas, TX 75205 phone (214) 528-7260 fax (214) 520-9673 Mario Messina, President, and COO	Seeking to recover $474,193 for drilling mud chemicals. Seven employees, 31 were laid off due to this loss. Annual sales: $6.92 million
Trading and Investment Corporation (TIC) P.O. Box 9503 Charlotte, NC 28299 Fanar Alghary, President	Seeking to recover $718,807 for components and parts for air coolers. Had seven employees, now only the owner operates the business. Annual sales: $3-4 million at the time of the embargo.
A.C. Monk and Company P.O. Box 166 Farmville, NC 27828 (919) 753-8000 (919) 753-8200 (fax) Albert C. Monk, III, President and COO	Seeking to recover $5 million for tobacco. 215 year round employees and 400-600 seasonal at the time of the embargo. Annual sales: $296 million
Dibrell Brothers Tobacco 512 Bridge Street Danville, VA 24543 (804) 792-7511 Claude Owen, President	Seeking to recover $6,388,000 for tobacco. 1400 employees Annual sales: $1 billion
Klein-Berger 1050 Sansome Street Suite 600 San Francisco, CA 94111 (415) 393-9500 Anthony Lewis, President	Seeking to recover $1,900,000 for yellow split peas. 986 employees, 19 were laid off because of this loss. Annual sales: $552 million (1993) Elevators buy beans in the following states: AZ,CA,CO,ID,KS,MI,MN,ND,NE,TX,WA
Consarc 100 Indel Avenue Rancocas, NJ 08073 (609) 267-8000 Raymond Roberts, President	Seeking to retain $6.4 million awarded in a Federal District Court judgement against OFAC and the government of Iraq. 57 employees, 56 were laid off. Annual sales: $10-35 million

October 19, 1993

Honorable Lee Hamilton
Chairman
House Foreign Affairs Committee
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Hamilton:

I am writing to express AMVETS' support for H.R. 3221, a bill to give priority to veterans when pursuing claims against Iraqi assets.

You are right -- veterans must come first. All too often, those who suffer the most direct losses as a result of war are subsequently shunted aside in favor of those whose losses are a result of business dealings prior to the conflict. AMVETS does not deny the need to compensate as many claimants as possible, including businesses. But allowing companies first priority in prosecuting claims will effectively deny settlement to veterans who bear the scars from our war with Iraq. We ask you to vigorously pursue passage of H.R. 3221 and offer our assistance.

Thank you for your support of America's veterans. AMVETS looks forward to working with you in the future.

Sincerely,

James J. Kenney

James J. Kenney
National Executive Director

JJK/mb

SERVING
WITH
PRIDE

AMVETS

DAMES & MOORE *v.* REGAN, SECRETARY OF TREASURY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-2078. Argued June 24, 1981—Decided July 2, 1981

In response to the seizure of American personnel as hostages at the American Embassy in Tehran, Iran, President Carter, pursuant to the International Emergency Economic Powers Act (IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of all property and interests in property of the Government of Iran which were subject to the jurisdiction of the United States. The Treasury Department then issued implementing regulations providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran," and that any licenses or authorizations granted could be "amended, modified, or revoked at any time." The President then granted a general license that authorized certain judicial proceedings, including prejudgment attachments, against Iran but did not allow the entry of any judgment or decree. On December 19, 1979, petitioner filed suit in Federal District Court against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks, alleging that it was owed a certain amount of money for services performed under a contract with the Atomic Energy Organization. The District Court issued orders of attachment against the defendants' property, and property of certain Iranian banks was then attached to secure any judgment that might be entered against them. Subsequently, on January 19, 1981, the Americans held hostage were released by Iran pursuant to an agreement with the United States. Under this agreement the United States was obligated to terminate all legal proceedings in United States courts involving claims of United States nationals against Iran, to nullify all attachments and judgments obtained therein, and to bring about the termination of such claims through binding arbitration in an Iran-United States Claims Tribunal. The President at the same time issued implementing Executive Orders revoking all licenses that permitted the exercise of "any right, power, or privilege" with regard to Iranian funds, nullifying all non-Iranian interests in such assets acquired after the blocking order of Novem-

ber 14, 1979, and requiring banks holding Iranian assets to transfer them to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury. On February 24, 1981, President Reagan issued an Executive Order which ratified President Carter's Executive Orders and "suspended" all claims that may be presented to the Claims Tribunal, but which provided that the suspension of a claim terminates if the Claims Tribunal determines that it has no jurisdiction over the claim. Meanwhile, the District Court granted summary judgment for petitioner and awarded it the amount claimed under the contract plus interest, but stayed execution of the judgment pending appeal by the defendants, and ordered that all prejudgment attachments against the defendants be vacated and that further proceedings against the bank defendants be stayed. Petitioner then filed an action in Federal District Court against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the various Executive Orders and regulations implementing the agreement with Iran. It was alleged that the actions of the President and the Secretary of the Treasury were beyond their statutory and constitutional powers, and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against Iran and the Atomic Energy Organization, its execution of that judgment, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, but entered an injunction pending appeal to the Court of Appeals prohibiting the United States from requiring the transfer of Iranian property that is subject to any writ of attachment issued by any court in petitioner's favor. This Court then granted certiorari before judgment.

Held:

1. The President was authorized to nullify the attachments and order the transfer of Iranian assets by the provision of the IEEPA, 50 U. S. C. § 1702 (a)(1)(B), which empowers the President to "compel," "nullify," or "prohibit" any "transfer" with respect to, or transactions involving, any property subject to the jurisdiction of the United States, in which any foreign country has any interest. Pp. 669–674.

(a) Nothing in the legislative history of either § 1702 or § 5 (b) of the Trading With the Enemy Act (TWEA), from which § 1702 was directly drawn, requires reading out of § 1702 all meaning to the words "transfer," "compel," or "nullify," and limiting the President's authority in this case only to continuing the freeze, as petitioner claims. To the contrary, both the legislative history and cases interpreting the TWEA fully sustain the President's broad authority when acting under

such congressional grant of power. And the changes brought about by the enactment of the IEEPA did not in any way affect the President's authority to take the specific action taken here. By the time petitioner brought the instant action, the President had already entered the freeze order, and petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The attachments obtained by petitioner, being subject to revocation, were specifically made subordinate to further actions which the President might take under the IEEPA. Pp. 671–673.

(b) Blocking orders, such as the one here, permit the President to maintain foreign assets at his disposal for use in negotiating the resolution of a declared national emergency, and the frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. To limit the President's authority, as petitioner urges, would mean that claimants could minimize or eliminate this "bargaining chip" through attachments or similar encumbrances. Pp. 673–674.

(c) Petitioner's interest in its attachments was conditional and revocable and as such the President's action nullifying the attachments and ordering the transfer of the assets did not effect a taking of property in violation of the Fifth Amendment absent just compensation. P. 674, n. 6.

(d) Because the President's action in nullifying the attachments and ordering the transfer of assets was taken pursuant to specific congressional authorization, it is "supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (Jackson, J., concurring). Under the circumstances of this case, petitioner has not sustained that burden. P. 674.

2. On the basis of the inferences to be drawn from the character of the legislation, such as the IEEPA and the Hostage Act, which Congress has enacted in the area of the President's authority to deal with international crises, and from the history of congressional acquiescence in executive claims settlement, the President was authorized to suspend claims pursuant to the Executive Order in question here. Pp. 675–688.

(a) Although neither the IEEPA nor the Hostage Act constitutes specific authorization for the President's suspension of the claims, these statutes are highly relevant as an indication of congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. Pp. 675–679.

(b) The United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.

Although those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate, and this practice continues at the present time. Pp. 679–680.

(c) That Congress has implicitly approved the practice of claims settlement by executive agreement is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, which created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. And the legislative history of the IEEPA further reveals that Congress has accepted the authority of the President to enter into settlement agreements. Pp. 680–682.

(d) In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President has some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. See, *e. g., United States* v. *Pink*, 315 U. S. 203. Pp. 682–683.

(e) Petitioner's argument that all settlement claims prior to 1952 when the United States had adhered to the doctrine of absolute sovereign immunity should be discounted because of the evolution of sovereign immunity, is refuted by the fact that since 1952 there have been at least 10 claim settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here. Pp. 683–684.

(f) By enacting the Foreign Sovereign Immunities Act of 1976 (FSIA), which granted personal and subject-matter jurisdiction to federal district courts over commercial suits by claimants against foreign states that waived immunity, Congress did not divest the President of the authority to settle claims. The President, by suspending petitioner's claim, has not circumscribed the jurisdiction of the United States courts in violation of Art. III, but has simply effected a change in the substantive law governing the lawsuit. The FSIA was designed to remove one particular barrier to suit, namely, sovereign immunity, and cannot be read as *prohibiting* the President from settling claims of United States nationals against foreign governments. Pp. 684–686.

(g) Long continued executive practice, known to and acquiesced in by Congress, raises a presumption that the President's action has been taken pursuant to Congress' consent. Such practice is present here and such a presumption is also appropriate. P. 686.

(h) The conclusion that the President's action in suspending peti-

tioner's claim did not exceed his powers is buttressed by the fact the President has provided an alternative forum, the Claims Tribunal, to settle the claims of the American nationals. Moreover, Congress has not disapproved the action taken here. Pp. 686–688.

(i) While it is not concluded that the President has plenary power to settle claims, even against foreign governmental entities, nevertheless, where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between this country and another, and Congress has acquiesced in the President's action, it cannot be said that the President lacks the power to settle such claims. P. 688.

3. The possibility that the President's actions with respect to the suspension of the claims may effect a taking of petitioner's property in violation of the Fifth Amendment in the absence of just compensation, makes ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims. And there is no jurisdictional obstacle to an appropriate action in that court under the Tucker Act. Pp. 688–690.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined; in all but n. 6 of which POWELL, J., joined; and in all but Part V of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part, *post*, p. 690. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 690.

C. Stephen Howard argued the cause for petitioner. With him on the briefs were *Raymond C. Fisher* and *Stanley C. Fickle*.

Rex E. Lee argued the cause for the federal respondents. On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Geller, Edwin S. Kneedler, Robert E. Kopp*, and *Michael F. Hertz*.

Thomas G. Shack, Jr., argued the cause for intervenor-respondent Islamic Republic of Iran. With him on the briefs were *Raymond J. Kimball* and *Christine Cook Nettsheim*. *Eric M. Lieberman* argued the cause for intervenor-respondent Bank Markazi Iran. With him on the briefs were *Leon-*

ard B. Boudin, Gordon J. Johnson, Michael Krinsky, Ellen J. Winner, Edward Copeland, and *Judith Levin. Elihu Inselbuch* filed a brief for intervenor-respondent Atomic Energy Organization of Iran.*

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as

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*Briefs of *amici curiae* urging reversal were filed by *Carol Goodman* and *Samuel Hoar* for Chas. T. Main International, Inc.; by *Gerald M. Singer* for Daniel, Mann, Johnson & Mendenhall; and by *Edward N. Costikyan* and *George P. Felleman* for Marschalk Co., Inc.

Daniel P. Levitt, Michael S. Oberman, Greg A. Danilow, Alan R. Friedman, and *Martin S. Zohn* filed a brief for Bank Melli Iran et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *David Ginsburg, Lee R. Marks, Alan S. Weitz, James A. DeBois,* and *Frank M. Steadman, Jr.*, for American Bell International Inc.; by *Thomas W. Luce III, M. David Bryant, Jr., Eugene Zemp DuBose, Monroe Leigh,* and *Michael Sandler* for Electronic Data Systems Corporation Iran; by *Brice M. Clagett* and *Paul G. Gaston* for FLAG, Inc.; by *Bartlett H. McGuire, Karen E. Wagner, George M. Duff III, Ralph L. McAfee, George F. Hritz, Robert B. von Mehren, Richard J. Medalie, Joseph S. Hellman, Norman R. Nelson, Richard C. Tufaro, A. H. Wilcox, Gilbert J. Helwig, John E. Hoffman, Jr., Thomas W. Cashel, Edwin McAmis, John W. Dickey, Michael M. Maney,* and *Peter H. Kaminer* for Morgan Guaranty Trust Company of New York; by *Michael Burrows, Robert B. Davidson, Lawrence W. Newman, David R. Hyde, Michael P. Tierney, Powell Pierpoint, Joseph S. Hellman, Kurt J. Wolff, Jeremiah D. Lambert, William Coston, Edward A. Woolley, James Schreiber,* and *James M. McHale* for Reading & Bates Corp. et al.; by *Alan Rayund* and *Margaret E. Rolnick* for Sperry Corp. et al.; by *John Carey* and *Jerry L. Siegel* for Sylvania Technical Systems, Inc.; and by *Alan I. Rothenberg* and *Robert E. Mangels* for Jerry Plotkin.

Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.,* at 594 (Frankfurter, J., concurring). We are confined to a resolution of the dispute presented to us. That dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended claims against Iran that may be presented to an International Claims Tribunal. This action was taken in an effort to comply with an Executive Agreement between the United States and Iran. We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.

But before turning to the facts and law which we believe determine the result in this case, we stress that the expeditious treatment of the issues involved by all of the courts which have considered the President's actions makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case. *Ashwander* v. *TVA*

297 U. S. 288. 347 (1936) (Brandeis, J., concurring). This does not mean that reasoned analysis may give way to judicial fiat. It does mean that the statement of Justice Jackson—that we decide difficult cases presented to us by virtue of our commissions, not our competence—is especially true here. We attempt to lay down no general "guidelines" covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.

Perhaps it is because it is so difficult to reconcile the foregoing definition of Art. III judicial power with the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive, without either challenge or interference by the Judiciary, that the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases. The tensions present in any exercise of executive power under the tripartite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once. The Court stated in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320 (1936):

> "[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

And yet 16 years later Justice Jackson in his concurring opinion in *Youngstown*, *supra*, which both parties agree brings together as much combination of analysis and common sense as there is in this area focused not on the "plenary and ex-

clusive power of the President" but rather responded to a claim of virtually unlimited powers for the Executive by noting:

> "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." 343 U. S., at 641.

As we now turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

I

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U. S. C. §§ 1701–1706 (1976 ed., Supp. III) (hereinafter IEEPA), declared a national emergency on November 14, 1979,[1] and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to

[1] Title 50 U. S. C. § 1701 (a) (1976 ed., Supp. III) states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." Petitioner does not challenge President Carter's declaration of a national emergency.

the jurisdiction of the United States . . . ." Exec. Order No. 12170, 3 CFR 457 (1980), note following 50 U. S. C. § 1701 (1976 ed., Supp. III).[2] President Carter authorized the Secretary of the Treasury to promulgate regulations carrying out the blocking order. On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979,] there existed an interest of Iran." 31 CFR § 535.203 (e) (1980). The regulations also made clear that any licenses or authorizations granted could be "amended, modified, or revoked at any time." § 535.805.[3]

On November 26, 1979, the President granted a general license authorizing certain judicial proceedings against Iran but which did not allow the "entry of any judgment or of any decree or order of similar or analogous effect . . . ." § 535.504 (a). On December 19, 1979, a clarifying regulation was issued stating that "the general authorization for judicial proceedings contained in § 535.504 (a) includes pre-judgment attachment." § 535.418.

On December 19, 1979, petitioner Dames & Moore filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic

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[2] Title 50 U. S. C. § 1702 (a)(1)(B) (1976 ed., Supp. III) empowers the President to

"investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . ."

[3] Title 31 CFR § 535.805 (1980) provides in full: "The provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time."

Energy Organization of Iran, and a number of Iranian banks. In its complaint, petitioner alleged that its wholly owned subsidiary, Dames & Moore International, S. R. L., was a party to a written contract with the Atomic Energy Organization, and that the subsidiary's entire interest in the contract had been assigned to petitioner. Under the contract, the subsidiary was to conduct site studies for a proposed nuclear power plant in Iran. As provided in the terms of the contract, the Atomic Energy Organization terminated the agreement for its own convenience on June 30, 1979. Petitioner contended, however, that it was owed $3,436,694.30 plus interest for services performed under the contract prior to the date of termination.[4] The District Court issued orders of attachment directed against property of the defendants, and the property of certain Iranian banks was then attached to secure any judgment that might be entered against them.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. Declaration of the Government of the Democratic and Popular Republic of Algeria (App. to Pet. for Cert. 21–29), and Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (*id.*, at 30–35). The Agreement

[4] The contract stated that any dispute incapable of resolution by agreement of the parties would be submitted to conciliation and that, if either party was unwilling to accept the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran." Pet. for Cert. 7, n. 2. In its complaint, which was based on breach of contract and related theories, petitioner alleged that it had sought a meeting with the Atomic Energy Organization for purposes of settling matters relating to the contract but that the Organization "has continually postponed [the] meeting and obviously does not intend that it take place." Complaint in *Dames & Moore* v. *Atomic Energy Organization of Iran*, No. CV 79–04918 LEW (Px) (CD Cal.), ¶ 27.

York, to be held or transferred as directed by the Secretary of the Treasury." Exec. Order No. 12279, 46 Fed. Reg. 7919.

On February 24, 1981, President Reagan issued an Executive Order in which he "ratified" the January 19th Executive Orders. Exec. Order No. 12294, 46 Fed. Reg. 14111. Moreover, he "suspended" all "claims which may be presented to the . . . Tribunal" and provided that such claims "shall have no legal effect in any action now pending in any court of the United States." *Ibid.* The suspension of any particular claim terminates if the Claims Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Claims Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due. *Ibid.*

Meanwhile, on January 27, 1981, petitioner moved for summary judgment in the District Court against the Government of Iran and the Atomic Energy Organization, but not against the Iranian banks. The District Court granted petitioner's motion and awarded petitioner the amount claimed under the contract plus interest. Thereafter, petitioner attempted to execute the judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property in Washington was noticed to satisfy the judgment. However, by order of May 28, 1981, as amended by order of June 8, the District Court stayed execution of its judgment pending appeal by the Government of Iran and the Atomic Energy Organization. The District Court also ordered that all prejudgment attachments obtained against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed in light of the Executive Orders discussed above. App. to Pet. for Cert. 106–107.

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to

prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. *Id.*, at 1–12. On May 28, 1981, the District Court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted. *Id.*, at 106–107. Prior to the District Court's ruling, the United States Courts of Appeals for the First and the District of Columbia Circuits upheld the President's authority to issue the Executive Orders and regulations challenged by petitioner. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, 651 F. 2d 800 (CA1 1981); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 211 U. S. App. D. C. 468, 657 F. 2d 430 (1981).

On June 3, 1981, petitioner filed a notice of appeal from the District Court's order, and the appeal was docketed in the United States Court of Appeals for the Ninth Circuit. On June 4, the Treasury Department amended its regulations to mandate "the transfer of bank deposits and certain other financial assets of Iran in the United States to the Federal Reserve Bank of New York by noon, June 19." App. to Pet. for Cert. 151–152. The District Court, however, entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to "any writ of attachment, garnishment, judgment, levy, or other judicial lien" issued by any court in favor of petitioner. *Id.*, at 168. Arguing that this is a case of "imperative public importance," petitioner then sought a writ of certiorari be-

fore judgment. Pet. for Cert. 10. See 28 U. S. C. § 2101 (e); this Court's Rule 18. Because the issues presented here are of great significance and demand prompt resolution, we granted the petition for the writ, adopted an expedited briefing schedule, and set the case for oral argument on June 24, 1981. 452 U. S. 932 (1981).

II

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Id.*, at 585. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.*, at 637. When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Ibid.* In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "con-

gressional inertia, indifference or quiescence." *Ibid.* Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Id.*, at 637–638.

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, we should be mindful of Justice Holmes' admonition, quoted by Justice Frankfurter in *Youngstown, supra,* at 597 (concurring opinion), that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U. S. 189, 209 (1928) (dissenting opinion). Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," 343 U. S., at 635, and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.

III

In nullifying post-November 14, 1979, attachments and directing those persons holding blocked Iranian funds and securities to transfer them to the Federal Reserve Bank of New York for ultimate transfer to Iran, President Carter cited five sources of express or inherent power. The Government, however, has principally relied on § 203 of the IEEPA, 91 Stat. 1626, 50 U. S. C. § 1702 (a)(1) (1976 ed., Supp. III), as authorization for these actions. Section 1702 (a)(1) provides in part:

> "At the times and to the extent specified in section 1701 of this title, the President may, under such regu-

lations as he may prescribe, by means of instructions, licenses, or otherwise—

"(A) investigate, regulate, or prohibit—

"(i) any transactions in foreign exchange,

"(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

"(iii) the importing or exporting of currency or securities, and

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

"by any person, or with respect to any property, subject to the jurisdiction of the United States."

The Government contends that the acts of "nullifying" the attachments and ordering the "transfer" of the frozen assets are specifically authorized by the plain language of the above statute. The two Courts of Appeals that have considered the issue agreed with this contention. In *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority,* the Court of Appeals for the First Circuit explained:

"The President relied on his IEEPA powers in November 1979, when he 'blocked' all Iranian assets in this country, and again in January 1981, when he 'nullified' interests acquired in blocked property, and ordered that property's transfer. The President's actions, in this regard, are in keeping with the language of IEEPA: initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compel[led]' the

'transfer' and 'withdrawal' of the assets, 'nullify[ing]' certain 'rights' and 'privileges' acquired in them.

"Main argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish 'interests' in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by *any* person of] *any* right, power or privilege with respect to . . . any property in which any foreign country has any interest . . . .' 50 U. S. C. § 1702 (a)(1)(B)." 651 F. 2d, at 806–807 (emphasis in original).

In *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, the Court of Appeals for the District of Columbia Circuit employed a similar rationale in sustaining President Carter's action:

> "The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets is an action that falls within the plain language of the IEEPA. In vacating the attachments, he acted to 'nullify [and] void . . . any . . . exercising any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States.'" 211 U. S. App. D. C., at 477, 657 F. 2d, at 439 (footnote omitted).

Petitioner contends that we should ignore the plain language of this statute because an examination of its legislative history as well as the history of § 5 (b) of the Trading With the Enemy Act (hereinafter TWEA), 40 Stat. 411, as amended, 50 U. S. C. App. § 5 (b) (1976 ed. and Supp. III), from which the pertinent language of § 1702 is directly drawn,

reveals that the statute was not intended to give the President such extensive power over the assets of a foreign state during times of national emergency. According to petitioner, once the President instituted the November 14, 1979, blocking order, § 1702 authorized him "only to continue the freeze or to discontinue controls." Brief for Petitioner 32.

We do not agree and refuse to read out of § 1702 all meaning to the words "transfer," "compel," or "nullify." Nothing in the legislative history of either § 1702 or § 5 (b) of the TWEA requires such a result. To the contrary, we think both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power. See, *e. g.*, *Orvis* v. *Brownell*, 345 U. S. 183 (1953).[5] Although Congress in-

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[5] Petitioner argues that under the TWEA the President was given two powers: (1) the power temporarily to freeze or block the transfer of foreign-owned assets; and (2) the power summarily to seize and permanently vest title to foreign-owned assets. It is contended that only the "vesting" provisions of the TWEA gave the President the power *permanently* to dispose of assets and when Congress enacted the IEEPA in 1977 it purposefully did not grant the President this power. According to petitioner, the nullification of the attachments and the transfer of the assets will permanently dispose of the assets and would not even be permissible under the TWEA. We disagree. Although it is true the IEEPA does not give the President the power to "vest" or to take title to the assets, it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here. Petitioner errs in assuming that the only power granted by the language used in both § 1702 and § 5(b) of the TWEA is the power temporarily to freeze assets. As noted above, the plain language of the statute defies such a holding. Section 1702 authorizes the President to "direct and compel" the "transfer, withdrawal, transportation, . . . or exportation of . . . any property in which any foreign country . . . has any interest . . . ."

We likewise reject the contention that *Orvis* v. *Brownell* and *Zittman* v. *McGrath*, 341 U. S. 446 (1951), grant petitioner the right to retain its attachments on the Iranian assets. To the contrary, we think *Orvis* supports the proposition that an American claimant may not use an attach-

tended to limit the President's emergency power in peacetime, we do not think the changes brought about by the enactment of the IEEPA in any way affected the authority of the President to take the specific actions taken here. We likewise note that by the time petitioner instituted this action, the President had already entered the freeze order. Petitioner proceeded against the blocked assets only after the Treasury Department had issued revocable licenses authorizing such proceedings and attachments. The Treasury Regulations provided that "unless licensed" any attachment is null and void, 31 CFR § 535.203 (e) (1980), and all licenses "may be amended, modified, or revoked at any time." § 535.805. As such, the attachments obtained by petitioner were specifically made subordinate to further actions which the President might take under the IEEPA. Petitioner was on notice of the contingent nature of its interest in the frozen assets.

This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." *Propper* v. *Clark*, 337 U. S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments, or similar encumbrances on property. Neither the purpose the

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ment that is subject to a revocable license and that has been obtained after the entry of a freeze order to limit in any way the actions the *President* may take under § 1702 respecting the frozen assets. An attachment so obtained is in every sense subordinate to the President's power under the IEEPA.

statute was enacted to serve nor its plain language supports such a result.[6]

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, see *id.*, at 636–637, and that we are not prepared to say.

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[6] Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them the President permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed," and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets, the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. In terminating these claims through Executive Order No. 12294, the President purported to act under authority of both the IEEPA and 22 U. S. C. § 1732, the so-called "Hostage Act."[7] 46 Fed. Reg. 14111 (1981).

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, 651 F. 2d, at 809–814; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 211 U. S. App. D. C., at 481, n. 15, 657 F. 2d, at 443, n. 15; *The Marschalk Co.* v. *Iran National Airlines Corp.*, 518 F. Supp. 69, 79 (SDNY

[7] Judge Mikva, in his separate opinion in *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 211 U. S. App. D. C. 468, 490, 657 F. 2d 430, 452 (1981), argued that the moniker "Hostage Act" was newly coined for purposes of this litigation. Suffice it to say that we focus on the language of 22 U. S. C. § 1732, not any shorthand description of it. See W. Shakespeare, Romeo and Juliet, Act II, scene 2, line 43 ("What's in a name?").

1981); *Electronic Data Systems Corp.* v. *Social Security Organization of Iran,* 508 F. Supp. 1350, 1361 (ND Tex. 1981).

The Hostage Act, passed in 1868, provides:

> "Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." Rev. Stat. § 2001, 22 U. S. C. § 1732.

We are reluctant to conclude that this provision constitutes specific authorization to the President to suspend claims in American courts. Although the broad language of the Hostage Act suggests it may cover this case, there are several difficulties with such a view. The legislative history indicates that the Act was passed in response to a situation unlike the recent Iranian crisis. Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will. See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 4331 (1868) (Sen. Fessenden); *id.*, at 4354 (Sen. Conness); see also 22 U. S. C. § 1731. These countries were not interested in returning the citizens in exchange for any sort of ransom. This also explains the reference in the Act to imprisonment "in violation of the rights of American citizenship." Although the Iranian hostage-taking violated international law and common decency,

the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated Presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and *its* citizens. See. *e. g.*, Cong. Globe. 40th Cong., 2d Sess., 4205 (1868); *American Int'l Group, Inc.* v. *Islamic Republic of Iran, supra*, at 490–491, 657 F. 2d, at 452–453 (opinion of Mikva, J.).

Concluding that neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action suspending claims, however, is not to say that these statutory provisions are entirely irrelevant to the question of the validity of the President's action. We think both statutes highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case. As noted in Part III, *supra*, at 670–672, the IEEPA delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country. The Hostage Act similarly indicates congressional willingness that the President have broad discretion when responding to the hostile acts of foreign sovereigns. As Senator Williams, draftsman of the language eventually enacted as the Hostage Act, put it:

> "If you propose any remedy at all, you must invest the Executive with some discretion, so that he may apply the remedy to a case as it may arise. As to England or France he might adopt one policy to relieve a citizen imprisoned by either one of those countries; as to the Barbary powers, he might adopt another policy; as to the islands of the ocean, another. With different countries that have different systems of government he might adopt different means." Cong. Globe, 40th Cong., 2d Sess., 4359 (1868).

Proponents of the bill recognized that it placed a "loose discretion" in the President's hands, *id.*, at 4238 (Sen. Stewart), but argued that "[s]omething must be intrusted to the Executive" and that "[t]he President ought to have the power to do what the exigencies of the case require to rescue [a] citizen from imprisonment." *Id.*, at 4233, 4357 (Sen. Williams). An original version of the Act, which authorized the President to suspend trade with a foreign country and even arrest citizens of that country in the United States in retaliation, was rejected because "there may be a great variety of cases arising where other and different means would be equally effective, and where the end desired could be accomplished without resorting to such dangerous and violent measures." *Id.*, at 4233 (Sen. Williams).

Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig* v. *Agee*, *ante*, at 291. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort

engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States* v. *Pink*, 315 U. S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, Foreign Affairs and the Constitution 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.[8] Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf. But it is also undisputed

[8] At least since the case of the "Wilmington Packet" in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. See Lillich, The Gravel Amendment to the Trade Reform Act of 1974, 69 Am. J. Int'l L. 837, 844 (1975). In fact, during the period of 1817–1917, "no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." W. McClure, International Executive Agreements 53 (1941). See also 14 M. Whiteman, Digest of International Law 247 (1970).

that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." Henkin, *supra*, at 262–263. Accord, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965) (President "may waive or settle a claim against a foreign state . . . [even] without the consent of the [injured] national"). It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.[9]

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 64 Stat. 13, as amended, 22 U. S. C. § 1621 *et seq.* (1976 ed. and Supp. IV). The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. 22 U. S. C. § 1623 (a). By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settle-

[9] Those agreements are [1979] 30 U. S. T. 1957 (People's Republic of China); [1976] 27 U. S. T. 3933 (Peru); [1976] 27 U. S. T. 4214 (Egypt); [1974] 25 U. S. T. 227 (Peru); [1973] 24 U. S. T. 522 (Hungary); [1969] 20 U. S. T. 2654 (Japan); [1965] 16 U. S. T. 1 (Yugoslavia); [1963] 14 U. S. T. 969 (Bulgaria); [1960] 11 U. S. T. 1953 (Poland); [1960] 11 U. S. T. 317 (Rumania).

ments with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future. H. R. Rep. No. 770, 81st Cong., 1st Sess., 4, 8 (1949).

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. With respect to the Executive Agreement with the People's Republic of China, for example, Congress established an allocation formula for distribution of the funds received pursuant to the Agreement. 22 U. S. C. § 1627 (f) (1976 ed., Supp. IV). As with legislation involving other executive agreements, Congress did not question the fact of the settlement or the power of the President to have concluded it. In 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States nationals against East Germany, prior to any settlement with East Germany, so that the Executive would "be in a better position to negotiate an adequate settlement . . . of these claims." S. Rep. No. 94–1188, p. 2 (1976); 22 U. S. C. § 1644b. Similarly, Congress recently amended the International Claims Settlement Act to facilitate the settlement of claims against Vietnam. 22 U. S. C. §§ 1645, 1645a (5) (1976 ed., Supp. IV). The House Report stated that the purpose of the legislation was to establish an official inventory of losses of private United States property in Vietnam so that recovery could be achieved "through future direct Government-to-Government negotiation of private property claims." H. R. Rep. No. 96–915, pp. 2–3 (1980). Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements. Though the IEEPA was enacted to provide for some limitation on the President's emergency powers, Congress stressed that "[n]othing in this act is intended . . . to interfere with the authority

of the President to [block assets], or to impede the settlement of claims of U. S. citizens against foreign countries." S. Rep. No. 95-466, p. 6 (1977); 50 U. S. C. § 1706 (a)(1) (1976 ed., Supp. III).[10]

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In *United States* v. *Pink*, 315 U. S. 203 (1942), for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could

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[10] Indeed, Congress has consistently failed to object to this longstanding practice of claim settlement by executive agreement, even when it has had an opportunity to do so. In 1972, Congress entertained legislation relating to congressional oversight of such agreements. But Congress took only limited action, requiring that the text of significant executive agreements be transmitted to Congress. 1 U. S. C. § 112b. In *Haig* v. *Agee*, *ante*, p. 280, we noted that "[d]espite the longstanding and officially promulgated view that the Executive has the power to withhold passports for reasons of national security and foreign policy, Congress in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.'" *Ante*, at 301, quoting *Zemel* v. *Rusk*, 381 U. S. 1, 12 (1965). Likewise in this case, Congress, though legislating in the area, has left "untouched" the authority of the President to enter into settlement agreements.

The legislative history of 1 U. S. C. § 112b further reveals that Congress has accepted the President's authority to settle claims. During the hearings on the bill, Senator Case, the sponsor of the Act, stated with respect to executive claim settlements:

"I think it is a most interesting [area] in which we have accepted the right of the President, one individual, acting through his diplomatic force, to adjudicate and settle claims of American nationals against foreign countries. But that is a fact." Transmittal of Executive Agreements to Congress: Hearings on S. 596 before the Senate Committee on Foreign Relations, 92d Cong., 1st Sess., 74 (1971).

be paid. The Court explained that the resolution of such claims was integrally connected with normalizing United States' relations with a foreign state:

> "Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President . . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities . . . is to be drastically revised." *Id.*, at 229–230.

Similarly, Judge Learned Hand recognized:

> "The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations." *Ozanic* v. *United States*, 188 F. 2d 228, 231 (CA2 1951).

Petitioner raises two arguments in opposition to the proposition that Congress has acquiesced in this longstanding practice of claims settlement by executive agreement. First, it suggests that all pre-1952 settlement claims, and corresponding court cases such as *Pink*, should be discounted because of the evolution of the doctrine of sovereign immunity. Petitioner observes that prior to 1952 the United States adhered to the doctrine of absolute sovereign immunity, so that absent action by the Executive there simply would be no remedy for a United States national against a foreign government. When the United States in 1952 adopted a more restrictive

notion of sovereign immunity, by means of the so-called "Tate" letter, it is petitioner's view that United States nationals no longer needed executive aid to settle claims and that, as a result, the President's authority to settle such claims in some sense "disappeared." Though petitioner's argument is not wholly without merit, it is refuted by the fact that since 1952 there have been at least 10 claims settlements by executive agreement. Thus, even if the pre-1952 cases should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here.

Petitioner next asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA), 28 U. S. C. §§ 1330, 1602 *et seq.* The FSIA granted personal and subject-matter jurisdiction in the federal district courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U. S. C. § 1330. Prior to the enactment of the FSIA, a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis. According to petitioner, the principal purpose of the FSIA was to depoliticize these commercial lawsuits by taking them out of the arena of foreign affairs—where the Executive Branch is subject to the pressures of foreign states seeking to avoid liability through a grant of immunity—and by placing them within the exclusive jurisdiction of the courts. Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.

We disagree. In the first place, we do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive"

and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law. See *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801). The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

Petitioner also reads the FSIA much too broadly. The principal purpose of the FSIA was to codify contemporary concepts concerning the scope of sovereign immunity and withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states. See *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, 651 F. 2d, at 813–814; *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 211 U. S. App. D. C., at 482, 657 F. 2d, at 444. The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments. It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements.[11]

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[11] The rejected legislation would typically have required congressional approval of executive agreements before they would be considered effective. See Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 243–261,

It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose *sub silentio* through the FSIA. And, as noted above, just one year after enacting the FSIA, Congress enacted the IEEPA, where the legislative history stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens. It would be surprising for Congress to express this support for settlement agreements had it intended the FSIA to eliminate the President's authority to make such agreements.

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown*, 343 U. S., at 610–611, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474 (1915). See *Haig* v. *Agee*, *ante*, at 291–292. Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

Our conclusion is buttressed by the fact that the means

302–311 (1975); Congressional Review of International Agreements: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 2d Sess., 167, 246 (1976).

chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts. Brief for Federal Respondents 13–14. Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naiveté which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims. Because there does appear to be a real "settlement" here, this case is more easily analogized to the more traditional claim settlement cases of the past.

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself,[12] Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Sen-

[12] See Hearings on the Iranian Agreements before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess. (1981); Hearings on the Iranian Asset Settlement before the Senate Committee on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. (1981); Hearings on the Algerian Declarations before the House Committee on Foreign Affairs, 97th Cong., 1st Sess. (1981).

ate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97-71, p. 5 (1981).[13] We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. As the Court of Appeals for the First Circuit stressed, "[t]he sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary." *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority*, 651 F. 2d. at 814. But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

V

We do not think it appropriate at the present time to address petitioner's contention that the suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.[14] Both petitioner and

[13] Contrast congressional reaction to the Iranian Agreements with congressional reaction to a 1973 Executive Agreement with Czechoslovakia. There the President sought to settle over $105 million in claims against Czechoslovakia for $20.5 million. Congress quickly demonstrated its displeasure by enacting legislation requiring that the Agreement be renegotiated. See Lillich, *supra* n. 8, at 839-840. Though Congress has shown itself capable of objecting to executive agreements, it has rarely done so and has not done so in this case.

[14] Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated peti-

the Government concede that the question whether the suspension of the claims constitutes a taking is not ripe for review. Brief for Petitioner 34. n. 32; Brief for Federal Respondents 65. Accord. *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Authority, supra,* at 814–815; *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 211 U. S. App. D. C., at 485. 657 F. 2d, at 447. However. this contention. and the possibility that the President's actions may effect a taking of petitioner's property. make ripe for adjudication the question whether petitioner will have a remedy at law in the Court of Claims under the Tucker Act, 28 U. S. C. § 1491 (1976 ed., Supp. III). in such an event. That the fact and extent of the taking in this case is yet speculative is inconsequential because "there must be at the time of taking 'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases,* 419 U. S. 102. 124–125 (1974). quoting *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641. 659 (1890); see also *Cities Service Co.* v. *McGrath,* 342 U. S. 330. 335–336 (1952); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59. 94. n. 39 (1978).

It has been contended that the "treaty exception" to the jurisdiction of the Court of Claims, 28 U. S. C. § 1502, might preclude the Court of Claims from exercising jurisdiction over any takings claim the petitioner might bring. At oral argument, however, the Government conceded that § 1502 would not act as a bar to petitioner's action in the Court of Claims. Tr. of Oral Arg. 39–42. 47. We agree. See *United States* v. *Weld,* 127 U. S. 51 (1888); *United States* v. *Old Settlers,* 148 U. S. 427 (1893); *Hughes Aircraft Co.* v. *United States,* 209 Ct. Cl. 446. 534 F. 2d 889 (1976). Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdic-

tioner's possible taking claim against the United States. We express no views on petitioner's claims that it has suffered a taking.

tional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act.

The judgment of the District Court is accordingly affirmed, and the mandate shall issue forthwith.

It is so ordered.

JUSTICE STEVENS, concurring in part.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the the Court's opinion. However, I join the remainder of the opinion.

JUSTICE POWELL, concurring in part and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. *Ante,* at 674, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,[1] and it certainly is premature with respect to many claims.

[1] Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property right compensable under the Fifth Amendment, *Armstrong* v. *United States,* 364 U. S. 40 (1960); *Louisville Bank* v. *Radford,* 295 U. S. 555

I agree with the Court's opinion with respect to the suspension and settlement of claims against Iran and its instrumentalities. The opinion makes clear that some claims may not be adjudicated by the Claims Tribunal, and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a "taking" claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges. The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as "bargaining chips" claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts.[2] The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.

(1935), there is a question whether the revocability of the license under which petitioner obtained its attachments suffices to render revocable the attachments themselves. See *Marschalk Co.* v. *Iran National Airlines Corp.*, 518 F. Supp. 69 (SDNY 1981).

[2] As the Court held in *Armstrong* v. *United States*, *supra*, at 49:

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Court unanimously reaffirmed this understanding of the Just Compensation Clause in the recent case of *Agins* v. *City of Tiburon*, 447 U. S. 255, 260–261 (1980).

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AMERICAN LAW DIVISION
MEMORANDUM

October 19, 1993

SUBJECT: Iraqi Sanctions and International Letters of Credit

AUTHOR: M. Maureen Murphy

The Office of Foreign Assets Control (OFAC) has issued regulations that permit, despite a freeze on Iraqi assets, under specified circumstances, the payment of international letters of credit issued or confirmed by U.S. banks against Iraqi funds on deposit in those banks. A controversy has arisen as to whether OFAC's regulations are too narrowly drawn, unfairly singling out confirmed letters of credit for special treatment. This memorandum will provide information on the nature of letters of credit and the various relationships involved therein and of the OFAC regulations.

Background

On August 2, 1990, President Bush, under the authority of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 et seq., imposed a freeze on Iraqi assets in the United States.[1] Under the regulations promulgated by OFAC, pursuant to this freeze, 31 C.F.R. § 575.510, special licenses may be issued on a case-by-case basis to allow payment of irrevocable letters of credit "issued or confirmed by a U.S. bank, or a letter of credit reimbursement confirmed by a U.S.bank" under certain circumstances regarding exportation prior to the date of the freeze and exercise of due diligence to divert shipment if delivery occurred after effective date. 31 C.F.R. §§ 575.510(a)91) and (2).[2]

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[1] Executive Order 12722, 55 *Fed. Reg.* 319-3 (August 3, 1990); Executive Order 12724, 55 *Fed. Reg.* 33089 (August 13, 1990).

[2] Applications for a license must contain specified details of the underlying transaction and a notarized certification that Iraq has no more than a 5% interest in the entity benefitting from the letter of credit. 31 C.F.R. § 575.510(b). The regulation makes it clear that it does not authorize exportation or performance of services subsequent to the date of the freeze, specifies reporting requirements, and reserves the right to impose separate criteria for

In contrast to this narrowly defined regulation authorizing payment only to beneficiaries of letters of credit relating to blocked funds if the letters of credit have been issued, confirmed, or reimbursement confirmed by a U.S. bank, the State Department authorization measure reported out by the Senate Committee on Foreign Relations, S. 1281, S. Rep. 103-107, 103d Cong., 2d Sess. (1993), would authorize payments on a broader basis. Under Section 712 of that measure:

> [n]otwithstanding any other provision of law, funds on deposit in United States banks that have been blocked under the International Emergency Economic Powers Act in accounts of foreign banks that issued or confirmed letters of credit for the benefit of United States nationals may be released to pay such letters of credit if the United States beneficiaries lawfully shipped goods or otherwise performed underlying contractual obligations based on such letters of credit before the declaration of a national emergency pursuant to that Act.[3]

Under the regulation, in order to qualify for payment on a letter of credit, a beneficiary must be able to show that a United States bank that has blocked Iraqi funds on deposit, has either issued a letter of credit or confirmed a letter of credit, or confirmed reimbursement of a letter of credit. Under the provision of S. 1281, a beneficiary need only show that a foreign bank has issued a letter of credit or confirmed a letter of credit and that a United States bank has funds on deposit in an account of that foreign bank.

Letters of Credit

A letter of credit has been described as:

> Essentially a third party beneficiary contract between the procuring customer and the issuing bank for the benefit of a payee-beneficiary. The bank, at the request of its customer, issues directly to the beneficiary a promise to pay a sum of money on being furnished with specified documents. The issuing bank as part of its contractual undertaking, agrees to honor any draft or demand for payment that complies with the terms of the letter of credit.[4]

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the issuance of licenses authorizing payment from an account of or held by a blocked U.S. bank owned or controlled by the Government of Iraq. 31 C.F.R. §§ 575.510(c),(d), and (e).

[3] This appears in the authorization bill as a result of an amendment offered by Senator Robb.

[4] 9 *Banking Law* § 232.03 (Bender) (footnote omitted).

Letters of credit reduce the risk of nonpayment when buyer and seller are in different countries, providing a mechanism for sellers to obtain payment upon shipment rather than having to wait until the buyer receives the goods. The obligation of the bank, therefore, runs to examining documentation. A federal court stated that "[t]he commercial vitality of the letter of credit depends upon its guarantee of payment independent of underlying agreements between the bank, its customer, and the beneficiary of the letter."[5]

Letters of credit differ from both bank loans and surety undertakings by banks. They offer a tremendous benefit to exporters of goods. With a letter of credit, an exporter may substitute a reliable debtor, i.e., a bank, for the uncertain credit of the distant buyer. The bank can, then, disburse payment upon examination of documents rather than inspection of goods. By entering into an agreement to make payments on behalf of its customer to a third party and communicating that agreement to the third party in a manner making it legally enforceable, the bank engages its own credit. In a loan situation, however, a bank does not engage its own credit. Unlike a surety undertaking, a letter of credit represents a primary obligation of the issuing bank to the beneficiary and does not involve the bank in the underlying obligation of the bank's customer toward the beneficiary. See 9 *Banking Law* (Bender) § 252.05.

Letters of credit developed separately from the common law. They date back to the Middle Ages, with origins in the Law Merchant governing customary practices among merchants.[6] In purely domestic United States transactions, if the parties make no specifications as to controlling law, Article 5 of the Uniform Commercial Code (UCC) as enacted by the governing jurisdiction would be applied to resolve any legal questions arising under letters of credit. In international transactions, however, usually a letter of credit will specify on its face that the Uniform Customs and Practice for Documentary Credits (rev. 1983) (UCP) is to govern; any gaps will be supplied by resorting to the UCC of the appropriate jurisdiction.[7]

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[5] *United States v. Sun Bank of Miami*, 609 F. 2d 832, 833 (9th Cir. 1980), citing *Pringle Associated Mortgage Corp. v. Southern National Bank of Hattiesburg, Miss.*, 571 F.2d 871, 874 (5th Cir. 1978):

[6] 9 *Banking Law* (Bender) § 232.04; *Voest-Alpine International Corporation v. Chase Manhattan Bank*. 707 F. 2d 680, 682 (2d Cir. 1983), citing 2 W. Holdsworth, *A History of English Law* 570 -572 (1922).

[7] See, e.g., *Engel Industries v. First American Bank*, 798 F. Supp. 9 (D.D.C. 1992) (letter of credit issued by First American Bank in connection with a sale between two United State corporations of goods that the buyer expected eventually to sell to Iraq.); *Bank of Cochin Ltd. v. Manufacturers Hanover Trust Co.*, 808 F. 2d 209 (2d Cir. 1986) (letter of credit issued by Bank of Cochin, Ltd for and confirmed by Manufacturers Hanover Trust Company in connection with goods to be shipped from West Germany to India).

The UCP has been described as follows:

> The UCP are [sic] neither national legislation nor an international treaty, but rather a set of rules that may be incorporated into the private law of the contract between two parties. As a general rule, the UCP are [sic] applicable to a documentary credit when an issuing bank expressly incorporates the UCP. Such a clause might state: 'The credit will be subject to the Uniform Customs and Practice for Documentary Credits (1983 revision), as set out in international Chamber of Commerce Publication No. 400.' Banks throughout the world routinely include such a clause in their letters of credit, either as members of an association of banks that have adopted the UCP or on an individual basis.[8]

The UCP specifies that the credits established are separate from the underlying contract on which they are based "and banks are in no way concerned with or bound by such contract," and that "[i]n credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents relate." UCP, Articles 3 and 4.

The UCP's definition[9] of "documentary credit" or "standby letter of credit"[10] is:

> any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for the credit),

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[8] Peter Winship, "Introduction and Bibliography," International Chamber of Commerce Uniform Customs and Practice For Documentary Credits (1983 revision), 2 *Basic Documents of International Economic Law* 743 (Commerce Clearing House 1990).

[9] Although, there was a definition of documentary credits in the 1974 revision of the UCP, the assumption is that the definition in the 1983 revision is that used in letters of credit at issue in the Iraqi freeze. This memorandum will, therefore, make reference only to the 1983 version.

The UCC definition of "letter of credit" is broader than that of the UCP in that it also includes "clean" credits, generally used in non-sales transactions in which there is not a requirement that specified documents accompany the beneficiary's draft. See UCC, Article 5, Section 5-103(1)(a).

[10] "A conventional letter transaction differs from a standby letter of credit in that while in conventional letter transactions the parties contemplate payment upon performance or completion of some act such as the delivery of goods, parties to a standby letter of credit condition payment upon a default in performance in the underlying transaction." 9 *Banking Law* (Bender) § 323.02[2).

(i) is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary, or

(ii) authorizes another bank to effect such payment, or to pay, accept such bills of exchange (drafts),
against stipulated documents, provided that the terms and condition of the credit are complied with.[11]

The UCP, further, specifies that credits may be either revocable or irrevocable, and that, in the absence of indication of revocability or irrevocability, a credit is to be deemed revocable. UCP, Article 7. The difference between the two is that "[a] revocable credit may be amended or canceled by the issuing bank at any moment and without prior notice to the beneficiary," subject to certain enumerated conditions, and an irrevocable credit "constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with...." UCP, Articles 9 and 10.

With respect to a confirming bank, the UCP specifies that "[w]hen an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter has added its confirmation, such confirmation constitutes a definite undertaking of such bank (the confirming bank), in addition to that of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with...." UCP, Article 10(b).

Article 11 of the UCP requires that "all credits must nominate the bank (nominated bank) which is authorized to pay (paying bank), or to accept drafts (accepting bank), or to negotiate (negotiating bank), unless the credit allows negotiating by any bank." UCP, Article 11 (c). It further specifies that, "[u]nless the nominated bank is the issuing bank or the confirming bank, its nomination by the issuing bank does not constitute any undertaking by the nominated bank to pay, to accept, or to negotiate." UCP, Article 11(c). It also provides that "[b]y nominating a bank other than itself, or by allowing for negotiation by any bank, or by authorizing or requesting a bank to add its confirmation, the issuing bank authorizes such bank to pay, accept or negotiate, as the case may be, against documents which appear on their face to be in accordance with the terms and conditions of the credit, and undertakes to reimburse such bank in accordance with the provisions of these articles." UCP, Article 11(d).

The role of the advising bank is described in the UCP in terms of one bank's using "the services of another bank or banks (the advising bank) to have the credit advised to the beneficiary." UCP, Article 12 (d).

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[11] UCP, Article 2.

Obligations of Issuing, Advising, and Confirming Banks

Under a letter of credit, there are two types of banks: the issuer of the credit and any other banks having a correspondent relationship to that bank with respect to the letter of credit. The correspondent banks are generally in the jurisdiction of the seller and under instructions by the issuing bank to advise, negotiate, accept or pay the seller's draft upon delivery of the documents specified in the letter of credit. A correspondent bank may be either an advisory bank or a confirming bank. The primary legal obligations of each of these is summarized below. The assumption is that, for purposes of this discussion, irrevocable letters of credit are at issue.

a. The Issuing Bank

Under a letter of credit used to facilitate an international sales transaction there are typically three contracts: (1) the underlying contract between the seller and buyer of the goods; (2) the contract between the seller and its bank to issue the letter of credit; and (3) the letter of credit, an agreement between the issuing bank and its customer for the benefit of the buyer, the third party beneficiary.[12] The "bank's payment obligation to the beneficiary is primary, direct and completely independent of any claims which may arise in the underlying sale of goods transaction."[13] Article 10(a) of the UCP specifies the obligations that an issuing bank undertakes:

> An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:
> (i) if the credit provides for sight payment--to pay, that payment will be made;
> (ii) if the credit provides for deferred payment--to pay, or that payment will be made, on the date (s) determinable in accordance with the stipulations of the credit;
> (iii) if the credit provides for acceptance--to accept drafts drawn by the beneficiary if the credit stipulates that they are to be drawn on the issuing bank, or to be responsible for their acceptance and payment at maturity if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit;

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[12] Article 10(a) of the UCP lists the various undertakings of the issuing bank. Among them is: "[a]n irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions are complied with: (2) if the credit provides for sight payment--to pay, that payment will be made...."

[13] *Voest-Alpine International Corporation v. Chase Manhattan Bank*, 707 F. 2d 680 (2d Cir. 1983).

> (iv) if the credit provides for negotiation--to pay without recourse to drawers and/or bona fide holders, draft (s) drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee stipulated in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.

b. The Advising Bank

Generally in credits arising in international sales transactions, the seller will require that a bank geographically near the seller be involved. The local bank may be the issuer, but often it is a correspondent of the issuer. Its initial function is to advise the beneficiary that the credit is open. It, thereupon, becomes an advising bank.[14]

The UCP does not contain an explicit definition of the functions of an advising bank, per se. It does however, state, in Article 8 that "[a] credit may be advised to a beneficiary through another bank (the advising bank) without engagement on the part of the advising bank, but that bank shall take reasonable care to check the apparent authenticity of the credit which it advises."

The UCC does contain a definition of an "advising bank": "[a]n 'advising bank' is a bank which gives notification of the issuance of a credit by another bank." UCC, Art. 5-103(e). The obligations of and advising bank are specified under UCC, Art. 5-107(1);

> (1) Unless otherwise specified an advising bank by advising a credit by another bank does not assume any obligation to honor drafts drawn or demands for payment made under the credit but it does assume obligation for the accuracy of its own statement.

In *Sound of Market Street v. Continental Bank International*, 819 F. 2d 384 (3d Cir. 1987), a case in which both the letter of credit and the request for advice were made subject to the UCP and which was decided under both the UCP and the UCC, the court refused to find an advising bank liable to a seller for damages resulting from the breach caused by the advising bank's delay in advising the letter of credit. The court noted that "when a letter of credit is advised to the beneficiary by an advising bank, there is a fourth agreement involved in the letter of credit transaction--an agreement between the issuing bank and the advising bank." *Sound of Market Street v. Continental Bank International*, 819 F. 2d, at 389. The court, therefore, on the basis of both the UCP and the UCC, held that not only was the obliging bank under no

[14] An advisory bank may also be used to discount the draft and to present the draft to the issuer. S. Mentschicoff, *How to Handle Letters of Credit*, 19 *Business Lawyer* 107 (1963).

engagement to pay or accept drafts on the letter of credit but it was under no contractual obligation to the seller/beneficiary of the letter of credit to transmit the advice in a timely fashion. For recourse, the beneficiary was directed to the issuing bank. Not only could the court find no authority for imposing liability in the law of the UCP or of the UCC, it could find no basis in agency law: as agent of the issuer, the advising bank owed the beneficiary of the letter of credit no duty of notification within a reasonable period of time.

Essentially, then, the advising bank does not engage its own credit in connection with the letter of credit, nor does it owe any duties to the beneficiary other than those specified in the letter of credit or those specified in the UCP and the UCC with respect to the apparent authenticity of the credit and the accuracy of its own statement.

c. *The Confirming Bank*

Under the UCP, a confirming bank enters into an agreement with the issuer for the benefit of the seller/beneficiary. The UCC defines a confirming bank as "a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank." UCC, Art. 5-103(f). Article 10(b) of the UCP defines the duties of a confirming bank and makes it clear that the confirming bank undertakes the obligations to back the letter of credit with its own engagement.[15]

One treatise summarizes the rights and duties of the confirming bank as follows:

> For various reasons, it is often desirable to have another bank undertake the same obligation assumed by the issuer.

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[15] The UCP's Article 10(b), which closely parallels, Article 10(a), relating to the obligations of the issuer, reads, in pertinent part:

> When an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter has added its confirmation, such confirmation constitutes a definite undertaking of such bank (the confirming bank), in addition to that of the issuing ban, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:
> (i) if the credit provides for sight payment--to pay, or that payment will be made;
> (ii) if the credit provides for deferred payment--to pay...;
> (iii) if the credit provides for acceptance--to accept drafts drawn by the beneficiary...;
> (iv) if the credit provides for negotiation--to negotiate without recourse to drawers...

> When this other bank holds itself out to the beneficiary as responsible of performance under the terms of the letter of credit, it is called a *confirming bank*. The beneficiary can then depend on the direct obligation of the confirming bank in addition to the liability of the opening bank. If the confirming bank pays under the letter of credit, it 'acquires the rights of an issuer.' In the opinion of the author those rights include a direct cause of action against the account party for reimbursement of any amounts paid pursuant to the letter of credit.[16]

Strict compliance with the terms of the letter of credit is, however, required before a court will order an issuer to reimburse a confirming bank that has honored drafts against the credit.[17]

Summary

Under current regulations, an OFAC license may be granted to pay a United States bank that has issued or confirmed an Iraqi letter of credit provided various standards are met regarding the timing and the satisfaction of the conditions of the letter of credit. Such a license may not be granted to an advising bank. The Robb Amendment to the State Department authorization measure would not require a United States bank to have issued or confirmed the letter of credit. If a foreign bank had issued or confirmed a letter of credit and had funds on deposit in a United States bank, there could be unblocking of the funds.

The difference between the two provisions is that under OFAC's regulations only a United States bank that has entered into an engagement to pay on the letter of credit provided its conditions are met can seek a license. United States banks that are merely advisors or other types of agents of the issuer of the letters of credit backed by frozen Iraqi funds may not seek reimbursement. This appears to comply with the law under the UCC and the UCP with respect to the obligations of the various banks in connection with a letter of credit. A United States seller undertaking a sale involving a letter of credit and not insisting that the local bank add its credit to the issuing bank's risks not being paid if the issuing bank for any reason cannot meet its obligation.

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Legislative Attorney

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[16] Burton V. McCullough, *Letters of Credit* 1.05[2] (footnotes omitted).

[17] *Seattle-First National Bank, N.A. v. F.D.I.C.*, 619 F. Supp. 1351 (W.D. Okla. 1985).

Leaflet Dropped by American Troops Encouraging Iraqis to Surrender

Multi-National Appeals to Surrender

اذا اردت المحافظه على حياتك

تبع الآتي:

- من فضلك اسحب مخزن الدخيرة من سلاحك
- احمل السلاح على كتفك الايسر مع توجيه الماسورة الى اسفل.
- للتأكد من رغبتك في المحافظة على حياتك فضلا
- ضع يديك فوق راسك.
- عند الاقتراب من مواقعنا - اقترب ببطء - أي فرد من الاخوة في المقدمة يرفع هذه الوثيقة فوق الراس.
- بهذا نتأكد من عزمك على المحافظة على حياتك.

وسوف تنتقل لرعاية الاخوة العرب في اقرب وقت ممكن

وأهلا و مرحبا بكم

'If you want to save yourself, comply with the following:

- Remove the magazine from your weapon
- Carry the weapon on your left shoulder, pointing the barrel downward.
- To assure us of your sincere desire to save yourself, please put both hands above your head.
- When approaching our locations, do so slowly, any person ahead of the group raises this leaflet above his head.
- This will affirm your desire for safety.
- You will be transferred into the hands of your Arab brothers as soon as possible

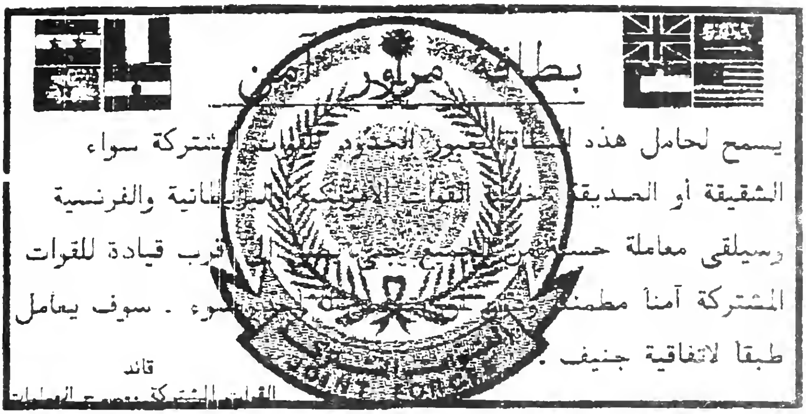
Welcome '

إذا أردت المحافظة على حياتك

تبع الآتي:

- من فضلك إسحب مخزن الذخيرة من سلاحك.
- إحمل السلاح على كتفك الأيسر مع توجيه الماسورة إلى أسفل.
- للتأكد من رغبتك في المحافظة على حياتك.. فضلاً
- ضع يديك فوق رأسك
- عند الإقتراب من مواقعنا - إقترب ببطء - أي فرد من الأخوة في المقدمة يرفع هذه الوثيقة فوق الرأس.
- بهذا نتأكد من عزمك على المحافظة على حياتك.

وأهلاً و مرحبا بكم



Above:

'The bearer of this card is permitted to cross the borders to the Joint Forces, whether [illegible] treatment so that he reaches the nearest Joint Forces Headquarters in complete safety without being exposed to any danger. He will be treated according to the Geneva Convention

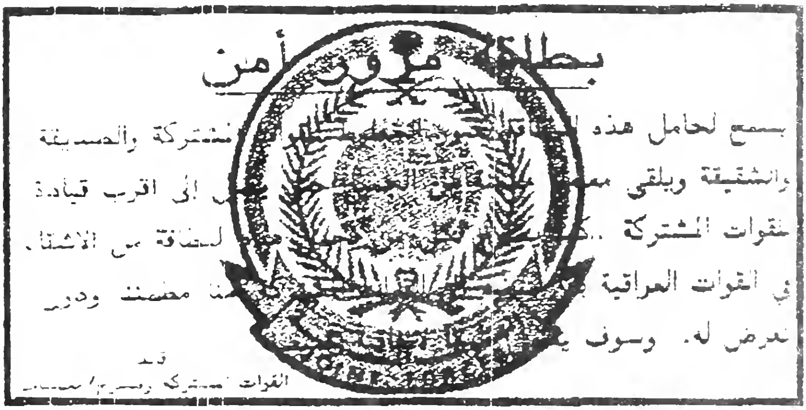
Commander
Joint Forces and Theater Operations'

Below:

Safe Passage Pass

The bearer of this leaflet will be allowed to cross the lines of friendly and Allied Forces and will receive good treatment from everybody until he arrives to the nearest Combined Forces Headquarters. It will also allow the bearer of this leaflet from our brothers in the Iraqi Forces to join the Combined Forces with peace of mind and without being subjected to any harm. He will be treated in accordance with the Geneva Convention

Commander
Joint Forces and Theater of Operations



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